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Supreme Court, U.S.
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In the Supreme Court of the United States

MARY ANN ARNOLD; ELSIE MAHLER SCHARFF, on behalf of themselves and all others similarly situated,

Petitioners,

v.

BANK OF AMERICA, N.A.; BANK OF AMERICA CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a class action in which Petitioners assert state common law and statutory claims is considered to be "in connection with the purchase or sale of a covered security" within the meaning of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. §§ 77p(b)-(c), 78bb(f)(1)-(2) (2000), where Petitioners do not allege that the misrepresentations and omissions involved a manipulation of the securities markets.

II. Whether the Eighth Circuit Court of Appeals over extended this Court's holding in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006) to preclude Petitioners' class action claims involving duties to beneficiaries under state law.

PARTIES TO THE PROCEEDINGS

The following named persons were plaintiffs/appellants in the Court of Appeals and are Petitioners in this Court:

Mary Ann Arnold; Elsie Mahler Scharff, on behalf of themselves and all others similarly situated.

The putative class was defined as: "all beneficiaries, owners, beneficial owners, or principals of trusts, accounts or other entities for which the Bank or any of its parents, subsidiaries, affiliates, predecessors, successors or assigns acted as a trustee, fiduciary or agent and that were directly or indirectly invested in nations Funds mutual funds at any time from September 8, 1998 to the present (the "Class").

No Petitioner has a parent or subsidiary company.

The following companies were defendants/appellees and are the Respondents in this Court:

Bank of America, N.A. and Bank of America Corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the Eighth Circuit is reported at *Kutten v. Bank of America, N.A.*, 530 F.3d 669 (8th Cir. 2008), and is reproduced in the Appendix (A-1 to A-4). The Order of the District Court is reproduced at A-5 to A-29.

JURISDICTION

The Eighth Circuit filed its opinion and judgment on June 16, 2008. This timely Petition for Writ of Certiorari is filed pursuant to the Supreme Court of the United States, Rule 13. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the Constitution provides in relevant part: "[T]he Laws of the United States...shall be the supreme Law of the Land...any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

The relevant provision of the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 78bb(f)(1) provides, in part:

> Class Action Limitations. No covered class action based upon the statutory or common law of any

State or subdivision thereof may be maintained in any State or Federal court by any private party alleging-

(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

The relevant provision of 28 U.S.C. § 1254 provides, in part:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree....

STATEMENT OF THE CASE

I. Introduction

The decision of the Eighth Circuit in *Kutten* raises important questions relating to the preemptive scope of the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 78bb(f)(1) ("SLUSA"), and the scope of this Court's decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006).

This case involves the interpretation of the "in connection with the purchase or sale" language contained in SLUSA and other relevant federal securities statutes. In passing SLUSA, Congress

amended Section 28 of the Securities Exchange Act of 1934 (the "1934 Act") to preempt any private action brought on behalf of 50 or more persons from proceeding under the statutory or common law in any state or federal court, if the suit alleges a misrepresentation or omission of a material fact "in connection with the purchase or sale of a covered security." 15 U.S.C. §§ 78bb(f)(5)(E), 77p(f)(3).

Dabit defined the scope of standing under SLUSA to include holders as well as purchasers and sellers. *Dabit* did not address the meaning of the phrase "in connection with the purchase or sale" in SLUSA, but instead simply expanded the standing requirements of SLUSA's preemptive scope beyond that of § 10(b) and Rule 10b-5, to include holders. This was done because a narrow interpretation of standing under SLUSA would have undercut the effectiveness of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 109 Stat. 737 (codified at 15 U.S.C. §§ 77z-1 and 78u-4), which sought to curb perceived abuses in class action litigation involving nationally traded securities. *Dabit*, 547 U.S. at 81.

This Court should grant review for two reasons. First, a consistent and uniform interpretation of SLUSA's preemptive scope in determining when state law class actions are preempted by SLUSA should be established. Second, this Court should grant review because the Eighth Circuit has extended SLUSA far beyond Congress' intent and this Court's guidance in *Dabit*, resulting in the preemption of state law causes of action that should remain viable.

II. Nature of Action; Proceedings and Disposition in the District Court

In this class action, Petitioners Mary Ann Arnold and Elsie Mahler Scharff, on behalf of themselves and all others similarly situated, assert state common law claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, unjust enrichment, breach of contract, violation of California Probate Code, violation of California Business and Professional Code, and violation of California and Missouri Prudent Investor Acts. (Class Action Complaint ("CAC" or "Complaint") ¶¶ 69-180). The claims are based on allegations that the Bank of America, N.A. ("Bank"), as well as its parent company, Bank of America Corporation ("BAC"), breached fiduciary and contractual duties owed to Petitioners and to other similarly situated beneficiaries of fiduciary accounts arising from Respondents' pervasive self-dealing in the context of the Bank's relationship with such beneficiaries. (CAC ¶ 2). The alleged self-dealings centered on the improper investment by the Bank of the assets held by it in fiduciary accounts in the Bank's own captive and proprietary mutual funds. (CAC ¶ 2-3)

On February 26, 2007, Respondents filed a motion to dismiss the Complaint, asserting, among other things, that SLUSA mandated dismissal of Petitioners' state law class action claims. On August 29, 2007, the District Court granted Respondents' motion to dismiss the class claims, although it denied the motion to dismiss as it pertained to Plaintiff Ellen Jane Kutten's individual claims. The District Court held that this case was "nearly identical" to *Siepel v. Bank of America, N.A.*, 239 F.R.D. 558 (E.D. Mo.

2006), which it had earlier dismissed. (A-15). The District Court found that the "alleged deception was premised on the purchase of Nations Funds...with fiduciary account assets. Thus, SLUSA preempts the state law class action claims." (A-22).[1]

Petitioners filed a motion requesting certification as a final judgment pursuant to Rule 54(b) as to the class claims. The motion was granted and final judgment as to the class claims was entered on October 1, 2007. Petitioners' Notice of Appeal to the Eighth Circuit Court of Appeals was timely filed on October 30, 2007.

III. The Court of Appeals Decision

On June 16, 2008 the Court of Appeals entered an Order affirming the District Court's dismissal of all of Petitioners' class claims. The Eighth Circuit agreed with the District Court that, based in part on allegations of misrepresentations and omissions of material facts, Petitioners' state law claims were preempted by SLUSA. The Eighth Circuit rejected Petitioners' argument that SLUSA does not apply to state law claims when the alleged misrepresentations and omissions were not made "in connection with" the purchase or sale of securities. The Eighth Circuit held that "SLUSA preemption is based on the conduct alleged, not the words used to describe the conduct." *Kutten*, 530 F.3d at 670-71 (A-3). The Court of Appeals relied almost entirely on its previous holding in *Siepel v. Bank of America, N.A.*, 526 F.3d 1122 (8th Cir. 2008), finding that "the Appellants' argument is

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[1] Nations Funds (now re-named Columbia Funds) was the Bank's proprietary mutual fund.

the same as was asserted by the plaintiffs in *Siepel*. We therefore reach the same results, and affirm the judgment of the district court." *Kutten*, 530 F.3d at 671 (A-4).

REASONS FOR GRANTING THE PETITION

This Court previously addressed SLUSA in a different context in *Dabit*, which held that SLUSA applies to preempt state law class action claims brought by holders of securities, as well as purchasers and sellers of securities, alleging the fraudulent manipulation of stock prices. The Court below interpreted *Dabit* as expanding SLUSA's preemptive scope to include any claim that "coincides" with a securities transaction, even state common law claims involving breaches of fiduciary duty that have absolutely nothing to do with securities transactions or relate to the pricing of securities.

I. The Opinion of the Court of Appeals Improperly Interpreted *Dabit* and Extended SLUSA so Broadly as to Effectively Preempt Trust Beneficiaries' Breach of Fiduciary Duty Claims Based Solely on State Law.

A. History of Enactment of SLUSA

The 1934 Act provides for comprehensive regulation of the trading of securities. Section 10(b) of the 1934 Act makes it unlawful for any person:

> To use or employ, in connection with the purchase or sale of any security..., any

> manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate for the protection of investors...

15 U.S.C. § 78j(b). Subsequently, the Securities Exchange Commission ("SEC") promulgated Rule 10b-5, which makes it unlawful for any person:

> directly or indirectly,..., (a) To employ any device, scheme, or artifice to defraud,...or (c) To engage in act, practice or course of dealing which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

The 1934 Act did not provide for any express private remedy for injuries for violations of these provisions. In 1946, however, courts began to recognize an implied right of action under these provisions. *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946). Twenty five years later in 1971, this Court implicitly recognized the existence of the private remedy. *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971).

After creating this implied right of action under § 10(b) and Rule 10b-5, courts were left with the task of defining its parameters. Because the securities fraud laws were based on common law fraud, courts used this as a starting point in formulating the boundaries. An action for common

law fraud requires proof that the plaintiff relied on a misstatement. Finding that in the reality of class action litigation, proof of reliance by each individual would prove difficult, if not impossible, this Court developed the "fraud on the market" theory. *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) (finding that a plaintiff could recover without proof of individual reliance based on proof that the plaintiff traded securities after defendant made material public misrepresentations to an efficient market, but before the fraud was revealed). In addition to the parameters discussed in *Basic*, this Court also held that the private remedy under § 10(b) and Rule 10b-5 should only include purchasers and sellers of securities to remedy fraud associated with federal securities laws. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). The reasoning behind limiting claims to sellers and purchasers was to limit the lawsuits to plaintiffs who could actually verify an injury.

Similar concerns prompted Congress to pass the PSLRA in 1995, which was intended to curb perceived "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests" and create a heightened pleading standard for federal securities laws based on fraud. *Dabit*, 547 U.S. at 81. The PSLRA had the unintended effect of causing some plaintiffs to file securities actions in state court. *Id.* at 82. In order to "stem this 'shif[t] from Federal to State courts' and 'prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of" the PSLRA, Congress enacted SLUSA. *Id.*

SLUSA prohibits a party from maintaining a state law claim which includes any covered class action alleging:

> (1) an untrue statement or omission of material fact in connection with the purchase or sale of a covered security; or (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. §77p(b). The "in connection with" phrase contained in SLUSA was undefined.

B. The *Dabit* Decision

At issue in *Dabit* were claims brought by brokers who were "wrongfully-induced" to hold securities in addition to claims that plaintiffs were "wrongfully-induced" to purchase securities based on misrepresentations and manipulative tactics. *Dabit*, 547 U.S. at 76. The Second Circuit in *Dabit* incorporated the "standing" limitations adopted in *Blue Chip Stamps* into SLUSA and found that fraud was only "in connection with the purchase or sale" of securities if it was alleged by a purchaser or a seller but not a holder. *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 50-51 (2d Cir. 2005). Thus, allegations that the plaintiffs were fraudulently induced not to sell or purchase, but merely to retain or hold a security, fell outside the scope of SLUSA. *Id.* at 38.

This Court disagreed with the Second Circuit and concluded that the operative preemptive language of SLUSA must be read to not only

encompass a purchaser or seller of securities but also a holder of securities. *Dabit*, 547 U.S. at 77-78. This Court reasoned that to not so hold would "undercut the effectiveness" of the Private Securities Litigation Reform Act of 1995 and "run contrary to SLUSA's stated purpose." *Id.* at 86.

C. The Opinion of the Court of Appeals in *Kutten* Improperly Applied *Dabit* and Vastly Expanded the Scope of the Preemptive Effect of SLUSA and is Contrary to the Decisions of the Other Courts of Appeals Which Have Addressed the Issue

The purpose of the 1934 Act is to "ensure honest markets, thereby promoting investor confidence." *United States v. O'Hagan*, 521 U.S. 642, 643 (1997). Therefore, courts should be mindful that SLUSA "should be 'construed' not technically and restrictively, but flexibly **to effectuate its remedial purpose.**" *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (emphasis added). At issue here is the scope and meaning of the language that Congress used in SLUSA's preemption clause.

The Eighth Circuit's decision below is inconsistent with and contrary to this Court's pragmatic view of SLUSA and its intended purpose to "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives" of the PSLRA. *Dabit*, 547 U.S. at 82. As this Court concluded in *Dabit*:

> The holder class action that respondent tried to plead, and that the Second Circuit envisioned, is distinguishable

> from a typical Rule 10b-5 class action in only one respect: It is brought by holders instead of purchasers or sellers. For purposes of SLUSA pre-emption, that distinction is irrelevant; the identity of the plaintiffs does not determine whether the complaint alleges fraud "in connection with the purchase or sale" of securities.

Id. at 88-89.

This Court previously has held that a stock broker's alleged conduct of selling customers' securities with the undisclosed intent of misappropriating the proceeds constituted fraud "in connection with the purchase or sale of any security." *Zandford*, 535 U.S. at 819-20. In *Zandford*, the question was whether the alleged fraudulent conduct was "in connection with the purchase or sale of any security" within the meaning of § 10(b) and Rule 10b-5. *Id.* at 815. This Court recognized that the SEC had adopted a broad reading of the phrase "in connection with the purchase or sale of any security" when the securities sales and the fraudulent practices were not independent acts, but instead, the fraud coincided with the sales themselves. *Id.* at 820. However, this Court also recognized that a causal connection must exist between the inducement and the actual deceptive device or fraud involving securities. *Id.* at 825 n.4.

The Eighth Circuit's decision conflicts with SLUSA's intended preemptive scope and expressed purpose of ensuring "national standards for securities class action lawsuits involving nationally traded securities." *Dabit*, 547 U.S. at 82, 87. The Eighth

Circuit applied the language of *Dabit* as a mere formula, while losing sight of the actual case and facts before it. As a result, trust beneficiaries and other class action plaintiffs alleging state law claims relating to the handling of fiduciary assets are left with substantial uncertainty as to whether state law any longer protects their interests or whether SLUSA's preemptive scope entirely eliminates their state law class action claims.

II. The Opinion of the Court of Appeals Was an Improper Extension of *Dabit* to a Situation Not Involving Fraud or the Manipulation of the Market.

There is no reason to read *Dabit* to expand SLUSA's preemptive scope to create an all encompassing swath of preemption that encompasses all claims remotely involving a security. The gist of Dabit's complaint was that defendants disseminated misleading research and thereby manipulated the stock prices. *Dabit*, 547 U.S. at 75. The holder class action that Dabit sought to represent was found to be preempted and this Court specifically found that the misconduct involved "the fraudulent manipulation of stock prices" that unquestionably qualified as fraud "in connection with the purchase or sale of securities." *Id.* at 89.

Since *Dabit*, the Third and Seventh Circuit Courts of Appeal have properly determined that SLUSA preemption does not apply to a state law class action claim when the alleged misrepresentations merely provide the contextual setting to the overall fraudulent scheme and also in instances where the plaintiff was not induced by the

fraudulent misrepresentation. Additionally, the Ninth and Tenth Circuits have properly interpreted *Dabit* to preempt claims when fraud has been alleged in the context of allegations of market manipulation. These four decisions have properly considered the purposes of SLUSA as articulated in *Dabit* and decided whether preemption applied given the facts of each case.[2]

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[2] District and state court decisions which have addressed the preemptive scope of SLUSA include the following: *Fishback v. Memory Gardens Mgmt. Corp.*, 2008 WL 2037308 (S.D. Ind. May 12, 2008) (holding that SLUSA does not preempt plaintiffs' state law class action claims); *Cheatham v. Kentucky Lottery Corp.*, 2008 WL 90034 (W.D. Ky. Jan. 8, 2008) (same); *City of Ann Arbor Employees' Ret. Sys. v. Gecht*, 2007 WL 760568 (C.D. Cal Mar. 9, 2007) (same); *Beary v. ING Life Ins. & Annuity Co.*, 2007 WL 3274426 (D. Conn. Nov. 5, 2007) (same); *Indiana Elec. Workers Pension Trust Fund v. Millard*, 2007 WL 2141697 (S.D.N.Y. July 25, 2007) (same); *LaSala v. Lloyds TSB Bank*, PLC, 514 F. Supp. 2d 447 (S.D.N.Y. 2007) (same); *LaSala v. Bank of Cyprus Public Co. Ltd.*, 510 F. Supp. 2d 246 (S.D.N.Y. 2007) (same); *LaSala v. UBS, AG*, 510 F. Supp. 2d 213 (S.D.N.Y. 2007) (same); *Brehm v. Capital Growth Fin. Inc.*, 2008 WL 553238 (D. Neb. Feb. 25, 2008) (same); *Hughes v. LaSalle Bank, N.A.*, No. 02-cv-06384, slip op. (S.D.N.Y. Feb. 5, 2008) (same); *Broadhead Ltd. P'ship v. Goldman, Sachs & Co.*, 2007 WL 951623 (E.D. Tex. Mar. 26, 2007) (finding that SLUSA preempted plaintiffs' state law class action claims); *Beckett v. Mellon Investor Serv.*, LLC, 2006 WL 3249189 (W.D. Wash. Nov. 8, 2006) (same); *Felton v. Morgan Stanley Dean Witter & Co.*, 429 F. Supp. 2d 684 (S.D.N.Y. 2006) (same); *Fisher v. Kanas*, 487 F. Supp. 2d 270 (E.D.N.Y. 2007) (same); *Rubery v. Radian Group, Inc.*, 2007 WL 1575211 (E.D. Pa. May 31, 2007) (same); *Rabin v. JPMorgan Chase Bank, N.A.*, 2007 WL 2295795 (N.D. Ill. Aug. 3, 2007) (same); *Dommert v. Raymond James Fin. Serv.*, 2007 WL 1018234 (E.D. Tex. Mar. 29, 2007) (same); *Potter v. Janus Inv. Fund*, 483 F. Supp. 2d 692 (S.D. Ill. 2007) (same); *Horattas v. Citigroup Fin. Mkts. Inc.*, 532 F. Supp. 2d 891 (W.D. Mich. 2007) (same); *In re Edwards Jones Holders Litig.*, 453 F.

While these courts have correctly recognized that the holding in *Dabit* merely expanded the standing requirements of SLUSA to include holders of securities, the Eighth Circuit improperly applied *Dabit* to broadly expand the "in connection with" phrase of SLUSA. This unwarranted expansion of SLUSA's preemptive scope expands *Dabit* far beyond what was intended by this Court or Congress. The Eighth Circuit has interpreted *Dabit* in a manner that has improperly expanded the "in connection with" phrase of SLUSA to be virtually an all-inclusive preemptive statute for all state law class action claims that might have any tenuous connection to a security. Federal securities laws must not be construed so broadly as to convert every common law cause of action that happens to remotely involve securities into a violation of federal securities laws. *Marine Bank v. Weaver*, 455 U.S. 551, 556 (1982) ("Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud."). Where no fraud or market manipulation is alleged, as was the case with Petitioners' Complaint herein, the concerns of SLUSA are not present and, consistent with *Dabit*, preemption should not be found.

As noted, several decisions from other Courts of Appeal demonstrate the proper analysis in light of *Dabit*. The Ninth Circuit in *U.S. Mortgage, Inc. v.*

Supp. 2d 1210 (C.D. Cal. 2006) (same); *Disher v. Citigroup Global Mkts., Inc.*, 487 F. Supp. 2d 1009 (S.D. Ill. 2007) (same); *Segal v. Fifth Third Bank N.A.*, 2008 WL 819290 (S.D. Ohio Mar. 25, 2008) (same); *Kurz v. Fidelity Mgmt. & Research Co.*, 2008 WL 2397582 (S.D. Ill. June 10, 2008) (same); *Wells Fargo Bank N.A. v. Superior Court*, 159 Cal.App. 4th 381 (Cal. App. 1 Dist. Jan. 25, 2008) (same).

Saxton, 440 F.3d 833 (9th Cir. 2007), ruled that the plaintiffs' state law class claims were properly removed from state court and that SLUSA preempted the claims because the misrepresentations and omissions at issue were "in connection with" the purchase or sale of a covered security. In *Saxton*, plaintiffs brought suit in state court against defendants alleging violations of state law by incorporating false financial information into the defendant company's regulatory filings on which plaintiffs relied in making several loans and granting several loan related concessions to the company defendant and its affiliates. *Id.* at 836-39. Plaintiffs alleged that the scheme had artificially inflated the price of the company's publicly traded shares. *Id.* at 844-45.

The Ninth Circuit recognized that while the plaintiffs themselves had not purchased or sold any of the publicly traded shares of the defendant company, they had alleged harm from defendants' scheme through inducement by misleading financial information in the defendants' financial statements. Therefore, the Ninth Circuit found that plaintiffs' act of reliance on the actual misstatements in alleging fraud "coincide[s]" with the purchase or sale of securities, and SLUSA therefore preempted the plaintiffs' claims. *Id.* at 845.

In *Anderson v. Merrill Lynch, Pierce, Fenner & Smith*, 521 F.3d 1278 (10th Cir. 2008), the shareholders of a defunct corporation brought a class action in state court alleging state claims against an investment bank that had loaned money to the corporation's founder, which were secured by shares of the corporation's stock. *Id.* at 1282. Shortly after the loan was made, the investment bank notified the

company's founder that it was demanding payment of the debt and that it intended to sell the shares of stock it held as collateral if he could not repay the loan. *Id.* The essence of the plaintiffs' claims were that the investment bank induced the founder of the company to open the loan account secured by company stock, and then liquidated those shares, flooding the market and driving down the price of the company's stock and thus benefiting the bank's prime brokerage accounts which previously had shorted the stock. *Id.* at 1283. The Tenth Circuit appropriately concluded that the plaintiffs' claims were preempted by SLUSA. *Id.* at 1287-88.

Saxton and *Anderson* both stand for the reasonable proposition that where market manipulation is alleged or there are claims of inflation of the price of a publicly traded stock, SLUSA should preempt the lawsuit. In *Kutten*, however, there were no allegations of market manipulation or stock inflation; indeed, there was nothing which should have caused SLUSA preemption.

In two other cases, Courts of Appeal have found no SLUSA preemption where there was no market manipulation or stock price inflation alleged. In *Gavin v. AT&T Corp.*, 464 F.3d 634 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 1492 (2007), the Seventh Circuit held that SLUSA did not preempt plaintiffs' state law class action claims alleging misrepresentations and omissions that only remotely involved a securities transaction. The Seventh Circuit recognized that the plaintiffs were trying to litigate a consumer fraud case and had made no allegations relating to the purchase or sale of a security. The litigation arose from the merger of

MediaOne into AT&T and focused on the fees charged by a registered broker-dealer. After the merger was complete, a MediaOne shareholder brought a state court class action against AT&T to recover for fraud based on a post-merger letter that failed to inform shareholders of their ability to exchange shares for free and only disclosed an option which included an exchange fee of seven dollars per share.

After removal by defendants and dismissal by the District Court pursuant to SLUSA, the Seventh Circuit determined that the alleged fraud, the omission in the letter which was void of any mention of the free exchange option, occurred after the securities transaction had already taken place and had nothing to do with federal securities laws. The "in connection with the purchase or sale of a covered security" language of SLUSA was not met because the shareholders had not been induced by the fraudulent misrepresentation. "One would hardly say that a class action against the bank in such a case would be an action 'involving nationally traded securities.'" *Id.* at 638 (internal citation omitted). The subsequent actions which occur after shares are sold are not "in connection with" the purchase or sale of a security, otherwise "SLUSA would apply to a class action by shareholders who suffered paper cuts when they opened the letters informing them of their rights under the merger." *Id.* at 639.

The Seventh Circuit determined that the "in connection with" language of SLUSA was not met when the alleged fraudulent behavior had "nothing to do with efforts to manipulate the prices of securities, with failure to make full disclosure of all facts known to the seller or issuer that might be material to a purchaser, with the regulation of stock exchanges, or

with any other concern of federal securities law." *Id.* at 640.

Similarly, in *LaSala v. Bordier et Cie*, 519 F.3d 121 (3d Cir. 2008), the Third Circuit recognized that it is only when an allegation of misrepresentation operates as a factual predicate to a legal claim in connection with a securities trade, that the "securities-trade ingredient" may be met and SLUSA preemption is found. In *LaSala*, the court determined that the misrepresentations made by the defendants were merely background details that provided the contextual setting to the overall scheme of the defendants in the plaintiffs' state law class action claims. *Id.* at 141. The Third Circuit held that SLUSA's text and legislative history lead to the conclusion that Congress did not intend to preempt state law claims when the plaintiffs' alleged misrepresentations are extraneous to the state law breach of fiduciary duty claims. *Id.* at 143.

As noted above, the *Kutten* court relied almost exclusively on its earlier decision in *Siepel v. Bank of America, N.A.*, 526 F.3d 1122 (8th Cir. 2008). In *Siepel*, beneficiaries of trust accounts maintained by the bank filed a class action against the bank and its holding corporation and affiliated investment companies, alleging claims under federal securities laws and state law claims of unjust enrichment and breach of fiduciary duty claims. *Id.* at 1124. The plaintiffs had argued that the bank's material omissions were not "in connection with" the purchase of the securities, such that the non-disclosure had not induced plaintiffs to purchase a security. *Id.*

The Eighth Circuit found that SLUSA preempted plaintiffs' state law class action claims by finding that *Dabit* held that "it is enough that the

fraud alleged 'coincide' with a securities transaction-whether by the plaintiff or by someone else." *Id.* at 1127 (citing *Dabit*, 547 U.S. at 85). The Eighth Circuit affirmed dismissal of the action, despite the fact that no fraud was alleged by Petitioners. *Id.* at 1124. The Eighth Circuit found that in *Dabit*, this Court had "instructed that SLUSA should be read with the 'presumption that Congress envisioned a broad construction,' so that the most troublesome class actions would be subject to the PSLRA's procedural reforms." *Id.*

In *Kutten*, the Eighth Circuit acknowledged that the Complaint did not "contain any allegations that facts were concealed. Nor does the Complaint in this action allege there were any omissions of facts or misrepresentations made to Plaintiffs."[3] (A-2 to A-3) Also, importantly, there was no allegation in the Complaint of any attempt to manipulate the securities market or otherwise manipulate the stock prices of any securities.

Dabit held that the misconduct of fraudulently manipulating stock prices "qualifies as fraud 'in connection with the purchase or sale' of securities." *Dabit*, 547 U.S. at 89. Conversely, when the transaction in question has no effect on the integrity of the securities markets, there is no reason to bring it within the scope of federal securities laws. The allegations here relate **solely** to Respondents' violation of their fiduciary duties by improperly investing Petitioners' funds in captive or proprietary funds of the Bank. As a result of the Bank's conduct, Petitioners alleged that the Bank reaped millions of

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[3] The *Kutten* Complaint did not include any claims under the federal securities laws.

dollars in administrative fees and caused millions of dollars in damage to the Class Plaintiffs. There were **no** allegations that Respondents engaged in any conduct that affected the integrity of the market or the prices of any securities. As such, the decision below vastly expanded the reach of *Dabit*, was improper, and conflicts with *Gavin* and *LaSala* and the reasoning in *Saxton* and *Anderson*.

III. The Opinion of the Court of Appeals Effectively Eliminates an Historically Entrenched State Law Remedy

Congress did not intend to "cavalierly" preempt state law causes of action when it enacted SLUSA, particularly those actions which were not based upon "securities fraud." *Dabit*, 547 U.S. at 87. In *Dabit*, this Court explained that preemption was appropriate because the so-called holder claims by shareholders were virtually unknown under state law. *Id.* at 88 (stating that this is not a situation "in which a federal statute has eliminated an historically entrenched state law remedy").

The claims alleged here—breach of fiduciary duty owed to trust and other fiduciary account beneficiaries by financial institution trustees—are quintessential state law, "[g]arden variety" common law (as well as statutory) claims against a fiduciary which involve not only a "long history" of state law enforcement and an "historically entrenched state law remedy," but remedies developed by the common law courts over many centuries, beginning long before the American Revolution. *Gavin*, 464 F.3d at 640.

The concern that the federal securities laws not interfere with core areas of state law, such as trusts and fiduciary relationships which were developed by the common law, is a central tenet of this Court's securities law jurisprudence. Previously, this Court has refused to extend the securities laws to cover shareholder claims for breaches of fiduciary duty and concealment by corporate directors and officers because that would "overlap and possibly interfere with" state corporate law. *Santa Fe Indus v. Green*, 430 U.S. 462, 473-75 (1975).

The policy considerations addressed in *Dabit* related to the fact that claims by "holders" were a comparatively new development in the case law. In sharp contrast, the allegations here, claims by beneficiaries for breach of fiduciary duty, have long been recognized under state law as being classic and traditional state law claims.

To extend the federal securities laws to supplant well-established state law enforcement of the beneficiary-fiduciary relationship would be contrary to settled law and to an enduring, fundamental public policy and, more specifically, to Congress' intent in enacting SLUSA. As Judge Posner explained in *Gavin*, such state law claims are not within SLUSA's "in connection with" language and should not be deemed to be preempted unless the defendant's omissions or misrepresentations were made to influence a securities transaction:

> The purpose of SLUSA was to prevent plaintiffs from making an end run around the restrictions on suits for federal securities fraud introduced by the Private Securities Litigation Reform

> Act of 1995 [citation omitted] by filing the suits in state courts under state law. [citing, *inter alia*, *Dabit*.]. . . . The plaintiffs are not trying to litigate a securities fraud case, but instead a consumer fraud case against companies that have made no effort to influence the purchase or sale of a covered security.

Gavin, 464 F.3d. at 640.

Judge Posner's reasoning in *Gavin* is entirely in accord with *Dabit's* holding that SLUSA's purpose was to "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of" the PSLRA. *Dabit*, 547 U.S. at 82. When claims, as here, are "garden variety" state and common law breach of fiduciary duty claims which were filed in federal court and were not meant to be an end run around the PSLRA, the terms of SLUSA should not "carry beyond its purpose." *Id.*; *Gavin*, 464 F.3d at 640.

Federal preemption occurs when "(1) Congress expressly preempts state regulation; (2) Congress intends federal law to 'occupy the field': or (3) state law conflicts with federal law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392-93 (1987). Without a clear intent, federal preemptive language must be read narrowly with a presumption against finding implied preemption; otherwise, "there is a danger that the heavy hand of federal law will prevent full development of state law." Ribstein, Larry E., *Dabit, Preemption and Choice of Law* (Univ. of Illinois Coll. of Law, Law and Economics Working Papers Series, Paper No. LE06-020, July 2006).

Congress intended SLUSA to be an implicit preemption statute and, as such, there should be preemption only when there is a state law claim which is in direct conflict with the purpose of the federal law or directly frustrates its purpose. *See Dabit*, 547 U.S. at 81. When there is no conflict or frustration of a federal law between Plaintiffs' state law claims and federal securities laws, there remains a presumption against preemption. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

Since a trust (or other fiduciary account) beneficiary's claim for breach of fiduciary duty has long been within the province of state law and state courts, SLUSA preemption should not be found. *Dabit*, 547 U.S. at 88. Justice Stevens, who wrote the decision in *Dabit*, previously has written that "[i]n all pre-emption cases...we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

An all-inclusive application of SLUSA preempting state common law breach of fiduciary claims in class actions would be inconsistent with a state's sovereignty powers. There is no reason to believe that Congress intended SLUSA to preempt such traditional state law claims as are presented here.

This Court should grant certiorari because the Eighth Circuit's expansively broad application of SLUSA preemption impermissibly expands the scope of SLUSA to encompass traditionally entrenched areas of state law.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
for the Eighth Circuit

No. 07-3565

Ellen Jane Kutten, individually and on behalf of her daughters,	*	
Plaintiff,	*	
Mary Ann Arnold; Elise Mahler Scharff, on behalf of themselves and all others similarly situated,	*	Appeal from the United States
Plaintiffs-Appellants,	*	District Court for Eastern District of
v.	*	Missouri.
Bank of America, N.A.; Bank of America Corporation,	*	
Defendants-Appellees.	*	

Submitted: June 11, 2008
Filed: June 16, 2008

Before MURPHY, BYE, and SHEPHERD, Circuit Judges.

SHEPHERD, Circuit Judge.

This case is one of the "at least five class actions in various jurisdictions seeking redress for the same alleged injuries" as claimed by the plaintiffs in Siepel v. Bank of America, N.A., Nos. 07-1899/07-1906, 2008 U.S. App. LEXIS 10667, at *6 (8th Cir. May 19, 2008). Finding the case "nearly identical" to

Siepel, which it had earlier dismissed, the district court[1] dismissed all of the Appellants' class action claims as preempted by the Securities Litigation Uniform Standards Act of 1998 (SLUSA), 15 U.S.C. §§ 77p(b), 78bb(f)(1). We affirmed the district court in Siepel, and do so again in this case.

Just as in Siepel, the Appellants' class action claims center on Bank of America's alleged plan to funnel trust assets into a mutual fund substantially owned by the Bank. See id. at *4-*5. In their Amended Complaint, the Appellants asserted twelve class action claims, including breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, unjust enrichment, breach of contract, violation of the California Probate Code, violation of the California Business and Professions Code, and violation of the California and Missouri Prudent Investor Acts. Each of the substantive claims "repeat[ed] and reallege[d]" the allegations made in the previous pages of the complaint.

The Siepel plaintiffs conceded that their complaint contained allegations that the Bank misrepresented and omitted material facts. Id. at *11. Although their complaint also rests on the same alleged plan by the Bank, the Appellants attempt to distinguish their complaint from the one in Siepel. In filings with this court, they assert that their complaint "does not contain any allegations that facts were concealed. Nor does the Complaint in this action allege there were any omissions of facts or

[1] The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota, sitting by designation in the Eastern District of Missouri.

misrepresentations made to Plaintiffs." "[D]ifferent results can be reached based upon changes in the language used in the complaint," they urge.

We review a district court's dismissal based on SLUSA preemption de novo, as a dismissal for failure to state a claim. Siepel, 2008 U.S. App. LEXIS 10667 at *4. SLUSA preempts state-law class actions that allege an untrue statement or omission of a material fact, or the use of a manipulative or deceptive device or contrivance "in connection with the purchase or sale of a covered security." 15 U.S.C. §§ 77p(b), 78bb(f)(1); Siepel, 2008 U.S. App. LEXIS 10667, at *10. In determining whether SLUSA applies, we do not rely on the names of the causes of action that the plaintiff alleges. Instead we look at the substance of the allegations, based on a fair reading. See Sofonia v. Principal Life Ins. Co., 465 F.3d 873, 879-80 (8th Cir. 2006); Dudek v. Prudential Sec., Inc., 295 F.3d 875, 879-80 (8th Cir. 2002). SLUSA preemption is based on the conduct alleged, not the words used to describe the conduct.

In the hearing on the Bank's motion to dismiss, Judge Magnuson attempted to purge the allegations of fraudulent conduct from the Appellants' Amended Complaint, and decide whether their complaint was different from that in Siepel. The Appellants' counsel explained:

> [The Bank's transfers of fiduciary account assets to Nations Funds] in fact were a cloak for self-dealing and engaging in conflict of interest transactions . . . . It's a breach of fiduciary duty case, and that duty includes disclosing to beneficiaries certain information.

After further argument, Judge Magnuson asked if the complaint was "no more than a regurgitation of the words of the misrepresentation." Counsel replied:

> [C]ertainly one of the components [of a fiduciary duty] is . . . a duty to disclose, a duty to be candid, a duty to be honest with your beneficiaries, to let your beneficiaries have the straight scoop with respect to the handling of their assets. . . . That is not the same thing as saying we were misrepresented to and this is what you lied about. . . . That's the failing to disclose. That's the failing to be candid. That's the failing to be honest. That's what we allege the bank failed to do repeatedly in the context of its wholesale conversion of common trust funds into their own mutual funds . . . .

We agree with the district court that the Appellants failed to distinguish their case from Siepel. Whatever the distinction between "deceiving" and "failing to be honest," or between "omitting a material fact" and "failing to disclose," it does not bear on whether SLUSA preempts the claim containing those allegations. In this case, the district court correctly found that without allegations of deceptive and misleading conduct, the Appellants' complaint was empty of any non-preempted class action claims.

In all other respects, the Appellants' argument is the same as was asserted by the plaintiffs in Siepel. We therefore reach the same result, and affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

Civ. File No. 06-0937 (PAM)

Ellen Jane Kutten, individually and on behalf of her daughters; and Mary Ann Arnold and Elsie Mahler Scharff, on behalf of themselves and all others similarly situated;

Plaintiffs,

v.

MEMORANDUM AND ORDER

Bank of America, N.A. and Bank of America Corporation,

Defendants.

This matter is before the Court on Defendants' Motion to Dismiss.[1] For the reasons that follow, the Court grants in part and denies in part the Motion.

BACKGROUND

Plaintiffs are present or former beneficiaries of fiduciary accounts for which Defendant Bank of America, N.A. ("Bank") served as corporate trustee.[2] Plaintiff Ellen Jane Kutten brings claims on behalf of herself and her two daughters. Plaintiffs Mary Ann Arnold and Elsie Mahler Scharff bring class claims on behalf of themselves and the following class:

> All beneficiaries, owners, beneficial owners, or principals of trusts, accounts

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[1] This Court is assigned to this case pursuant to 28 U.S.C. § 294(c).

[2] Defendant Bank of America Corporation is a financial holding company with a number of subsidiaries, including the Bank.

> or other entities for which the Bank or any of its parents, subsidiaries, affiliates, predecessors, successors, or assigns acted as a trustee, fiduciary, oragent and that were directly or indirectly invested in Nations Funds mutual funds at any time from September 8, 1998 to the present.[3]

(Am. Compl. ¶61.)

A. Factual Allegations Supporting Claims

The Amended Complaint alleges that Defendants engaged in "pervasive self-dealing" by converting trust assets to Columbia Funds (f/k/a Nations Funds), mutual funds that were controlled by the Bank's affiliates and subsidiaries. (Id. ¶2.) The conversions purportedly "allowed the Bank to funnel the assets in its captive fiduciary accounts into shares of the Nations Funds [and] were carried out on a wholesale basis without giving consideration as to whether the Conversions were prudent and in the beneficiaries' best interests." (Id. ¶31.)

The Amended Complaint alleges that the conversions negatively affected Plaintiffs in several ways. First, the conversions allowed the Bank to generate higher fees and increased expenses. (Id. ¶¶

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[3] The class is divided into three proposed sub-classes: (1) a sub-class consisting of members of the class whose fiduciary accounts originated in and/or involved beneficiaries residing in California (such as Arnold); (2) a sub-class consisting of members of the class whose accounts originated in and/or involved beneficiaries residing in Missouri (such as Scharff); and (3) a sub-class consisting of all class members who, within the class period, have had their fiduciary accounts subject to one or more conversions. (Am. Compl. ¶62.)

33, 38, 46, 48, 52-53, 55.) Plaintiffs acknowledge that the Bank issued notices about the fees and expenses; however, they assert that the notices were misleading so that class members "had no practical way of knowing or understanding how their individual accounts would be affected either by the conversion or the investments of the assets therein in Nations Funds or that the Bank was to receive substantial benefits therefrom." (Id. ¶¶ 46-47; see also id. ¶ 52 ("The beneficiaries were left on their own to figure out, if they could, whether their accounts would pay more for the services related to the Nations Funds investments than they had paid pre-coversion for the pre-existing investments.").) Plaintiffs further assert that they "have never received a 'straight' or any answers to their questions with respect thereto and have received misleading or deceptive information as to the impact of such investments upon them and their fiduciary accounts." (Id. ¶ 50.) Thus, "it was impossible for co-fiduciaries, beneficiaries, and others . . . to understand and know the true costs of ownership of Nations Funds to the fiduciary accounts." (Id.)

Second, the conversions purportedly allowed the Bank to use its own proprietary funds rather than less expensive and well-proven competitive funds. (Id. ¶¶ 38-41, 54.) In addition, Defendants purportedly failed to follow government guidelines on avoiding a breach of fiduciary duties when using proprietary mutual funds. (Id. ¶¶ 36-40.) Plaintiffs allege that Defendants falsely touted "the so-called 'benefits' of the conversions" and "coerced" the authorization of the conversion. (Id. ¶¶ 42-44.)

Third, the conversions purportedly curtailed the individualized service previously provided to the

fiduciary accounts. (Id. ¶¶ 22, 33.) As a consequence, "the 'customized recommendations' and 'wealth management expertise' promised by the Bank in its advertisements are fictions and have been fictions since" the Bank acquired numerous other financial institutions throughout the United States. (Id, ¶ 24.) Despite the lack of individual service, the Bank assessed numerous fees. (Id. ¶ 55.)

Finally, the Amended Complaint alleges:

> In connection with the transfer of fiduciary responsibilities, and in violation of its fiduciary duty, the Bank did not disclose all material facts, including that the transfer would have a material adverse effect on such interested parties. . . . that they had a right to object to the transfer and, inter alia, obtain a replacement fiduciary. . . . Plaintiffs believe and therefore allege that the Bank failed to provide such notice in each of the other instances where the fiduciary responsibilities of an Acquired Bank were taken over by the Bank or one of its predecessors. As such, all similarly affected beneficiaries were wrongly denied notice and the right to object to a transfer of fiduciary responsibilities to the Bank.

(Id. ¶¶ 27-28.)

B. Counts in the Amended Complaint

Counts 1 through 3 of the Amended Complaint assert claims for breach of fiduciary duty and for punitive damages. Specifically, Count 1 alleges that

the Bank failed to consider the best interests of fiduciary account beneficiaries when it transferred fiduciary account assets to Nations Funds. Instead, the Bank purportedly was motivated by its own desire to generate fees and reduce operating expenses. Thus, the Bank allegedly breached its duty of loyalty to Plaintiffs. (Id. ¶¶ 70-73.) Count 2 asserts a claim for punitive damages based on Defendants "deliberately and knowingly" breaching fiduciary duties by "self-dealing in the face of obvious conflicts of interest." (Id. ¶ 74.) Count 3 asserts that Defendants and their affiliates devised a corporate plan to reduce operating expenses and increase profits by converting fiduciary account assets to Nations Funds "without regard to whether such investments were prudent and in the best interests of Plaintiffs and other beneficiaries of fiduciary accounts." (Id. ¶¶ 77-79.)

Count 4 alleges that Defendants were unjustly enriched by receiving fees and profits from the fiduciary accounts at the expense of the fiduciary account beneficiaries "under guise of allegedly providing more services." (Id. ¶¶ 83-85.) Counts 5 and 6 assert breach of contract claims based on alleged promises to provide individualized investment management services to the fiduciary accounts. (Id. ¶¶ 88-89, 93.) Count 6 also alleges that Defendants failed to give the fiduciary account beneficiaries notice that the acquisition of predecessor banks would materially change the relationship or provide the beneficiaries with the opportunity to seek a replacement fiduciary. (Id. 95.)

Counts 7 through 10 assert violations of various California state laws. In Counts 7 and 8, Arnold seeks relief on behalf of the California sub-

class under the California Probate Code for alleged self-dealing in violation of the fiduciary duties of loyalty and trust. (Id. ¶¶ 97-115.) In Count 9, Kutten and Arnold assert violations of the California Business and Professions Code based on alleged deceptive business practices the Bank employed in self-dealing transactions. (Id. ¶¶ 116-19.) In Count 10, Arnold and Kutten allege that the Bank violated Section 16045 of the California Probate Code by failing to exercise reasonable care. (Id. ¶¶ 122-23.) In particular, they contend that the Bank failed to make prudent investment and management decisions with respect to the fiduciary accounts by failing to make individualized determinations and by causing the accounts to incur excessive expenses. (Id. ¶¶ 124-25.)

In Counts 11 and 12, Scharff asserts a claim on behalf of the Missouri sub-class for violations of the Missouri Prudent Investor Act, as well as Missouri common law. (Id. ¶¶ 127-28, 138-39.) Specifically, she alleges that the Bank breached its duty of loyalty and its duty to exercise reasonable care in investment management decisions by engaging in self-dealing transactions. (Id. ¶¶ 128-36, 139-44.)

In Counts 13 through 18, Kutten asserts individual claims for breach of fiduciary duty, breach of contract, unjust enrichment, and violations of the Missouri Prudent Investor Act. ¶¶ 146-78.)

DISCUSSION

A. Standard of Review

A complaint must include "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007). When deciding a motion to dismiss under

Federal Rule of Civil Procedure 12(b)(6), the Court accepts all factual allegations as true and liberally construes the complaint in the light most favorable to the plaintiff. See id. at 1964-65.

B. Class Claims

Defendants argue that the Securities Litigation Uniform Standards Act of 1998 (SLUSA) preempts the state-law class claims in the Amended Complaint. SLUSA requires preemption and dismissal of certain class actions that allege false statements or omissions of material fact made in connection with the purchase or sale of certain securities. 15 U.S.C. § 78bb(f)(1); Dudek v. Prudential Sec., Inc., 295 F.3d 875, 879 (8th Cir. 2002). Dismissal of an action is appropriate when: (1) the action is a "covered class action" under SLUSA; (2) the action purports to be based on state law; (3) the defendant is alleged to have misrepresented or omitted a material fact; and (4) the defendant's alleged misrepresentation or omission of a material fact was made "in connection with the purchase or sale of a covered security." Dudek, 295 F.3d at 879. The parties agree that this action constitutes a "covered class action" and alleges state law claims. Thus, only the third and fourth elements are at issue.

1. Misrepresentations or Omissions

Defendants argue that the essence of the Amended Complaint is based on misrepresentations and omissions made to Plaintiffs in connection with the purchase or sale of a covered security. Plaintiffs respond that the allegations of misrepresentations and omissions are merely ancillary to their state law claims.

SLUSA is "an express exception to the well-pleaded complaint rule." Rowinski v. Salomon Smith Barney, Inc., 398 F.3d 294, 304 (3d Cir. 2005). Even where plaintiffs attempt to conceal claims based on the misrepresentation or omission of material facts with state law labels, courts disregard such labels and dismiss the claims as preempted by SLUSA. See, e.g., Prof'l Mgmt. Assocs., Inc. Employees' Profit Sharing Plan v. KPMG LLP, 335 F.3d 800, 803 (8th Cir. 2003) (negligence claim preempted by SLUSA because it was "essentially a securities fraud claim"); Dudek, 295 F.3d at 879 (breach of fiduciary duty and unjust enrichment claims preempted by SLUSA because essence of complaint was that defendants misstated or omitted material facts in connection with a security's purchase and sale). Thus, the Court must focus on the substance of the allegations and be wary of efforts to circumvent SLUSA through artful pleading. See Dudek, 295 F.3d at 879-80; see also Rowinski, 398 F.3d at 304-05 (determining whether a reasonable reading of the complaint reveals allegations within SLUSA's purview); In re Salomon Smith Barney Mut. Fund Fees Litig., 441 F. Supp. 2d 579, 602 (S.D.N.Y. 2006) (dismissing breach of fiduciary duty claims and finding plaintiffs' attempt to evade SLUSA unavailing); Felton v. Morgan Stanley Dean Witter & Co., 429 F. Supp. 2d 684, 692 (S.D.N.Y. 2006) (looking "beyond the face of the complaint to analyze the substance of the allegations made"). When the gravamen of the complaint involves an untrue statement or substantive omission of a material fact, and when that conduct coincides with a transaction involving a covered security, SLUSA mandates dismissal. Dudek, 295 F.3d at 879-80; see also Prof'l Mgmt. Assocs., Inc. Employees'

Profit Sharing Plan, 335 F.3d at 802 (applying SLUSA preemption to implicit allegations of misrepresentations and omissions in connection with securities purchases).

In this case, the class claims are framed as breach of fiduciary duty, unjust enrichment, breach of contract, and violations of state statutes. Nonetheless, the crux of the Amended Complaint is that Defendants engaged in self-dealing transactions and misrepresented or omitted material facts relating to those transactions. (See, e.g., Am. Compl. ¶¶ 24, 27-28, 4244, 46-47, 50, 52.) Indeed, Plaintiffs emphasize that "the breach of the fiduciary duty to disclose diversion of trust assets or facts relevant to whether the bank has committed multiple breaches of duty is what is at issue in this case." (Pls.' Mem. Opp'n Mot. Dismiss at 11.) Moreover, at the hearing on this Motion, Plaintiffs made clear that this action challenges Defendants' failure to disclose:

> The Bank [transferred fiduciary account assets to Nations Funds] under the guise of providing individual and customized management of assets, but in fact were a cloak for self-dealing and engaging in conflict of interest transactions. . . . And we can't lose sight of the fact that that's what this case is all about. It's a breach of fiduciary duty case, and that duty includes disclosing to beneficiaries certain information.
>
> . . .
>
> And certainly one of the components is . . . a duty to disclose, a duty to be candid, a

duty to be honest with your beneficiaries, to let your beneficiaries have the straight scoop with respect to the handling of their assets. It's a very, very high duty. And we allege that . . . they have a duty under state common law, a fiduciary duty, to be candid with their beneficiaries, to disclose to their beneficiaries.

. . .

And our complaint I think clearly indicates that what they did to breach it in this case was engage in self-dealing. They did—they were not candid with us. They did not tell us that, you know, we can get you from common trust funds into mutual funds but you're going to be paying more or it's going to cost you more. Okay, we're going to be making money at your expense. That I think is something that a fiduciary should tell a beneficiary. And we're talking about billions of dollars being managed by this bank and failing to tell people we're going to convert common trust funds in the billions of dollars . . . and it's going to affect your income. It's going to affect your yield. Why wouldn't a fiduciary have the responsibility to disclose that to a beneficiary? . . . That's the failing to disclose. That's the failing to be candid. That's the failing to be honest. That's what we allege the bank failed to do repeatedly in the context of its wholesale conversion of common trust funds into their own mutual funds, and

> it's what the bank did when they streamlined the provision of fiduciary services to their customers.

(Aug. 1, 2007 Hr'g Tr. 25-26, 36-39.)

Thus, Plaintiffs' effort to distinguish this case from Siepel et al. v. Bank of America et al., 239 F.R.D. 558 (E.D. Mo. 2006) is unavailing. Siepel is nearly identical to this case. As in this case, current and former trust beneficiaries asserted various state law claims based on the same purportedly wrongful conduct: the transfer of fiduciary account assets into proprietary mutual funds without considering other alternatives, the failure to disclose the conflict of interest and the resulting fees, and misrepresentations that the defendant provided individualized account services. Id. at 560. Because the essence of the Siepel complaint was that the defendants made misrepresentations and omissions of material facts regarding the ransfer of fiduciary account assets to the proprietary mutual fund, the Court held that SLUSA preempted the state law claims. Id. at 567-68.

Likewise, this case is similar to Felton; Spencer v. Wachovia Bank, N.A., No. 05- 81016, 2006 WL 348043 (S.D. Fla. May 10, 2006); Beckett v. Mellon Investor Services, LLC, No. 06-5245, 2006 WL 3249189, at *3 (W.D. Wash. Nov. 8, 2006); Broadhead Limited Partnership v. Goldman, Sachs & Co., No. 06-009, 2007 WL 951623 (E.D. Tex. Mar. 26, 2007); Dommert v. Raymond James Financial Services et al., No. 06-102, 2007 WL 1018234 (E.D. Tex. Mar. 29, 2007); and Rabin v. JPMorgan Chase Bank. N.A., No. 065454, 2007 WL 2295795 (N.D. Ill. Aug. 3, 2007). In all these cases, the plaintiffs alleged breaches of

fiduciary duties, breaches of contract, unjust enrichment, and state statutory violations based on alleged failures to disclose. Nonetheless, the courts uniformly held that SLUSA preempted the state law claims.

In Felton, the plaintiffs alleged that two agreements required the defendant to abide by the rules and customs of the National Association of Securities Dealers, New York Stock Exchange, and other self-regulatory organizations. 429 F. Supp. 2d at 687. They further claimed that the defendant breached the agreements by failing to provide objective research and recommendations and instead provided self-serving, biased information. Id. at 687-88. Although the complaint alleged only a breach of contract claim, the court held that SLUSA preemption applied:

> I conclude without difficulty that Plaintiffs' claim is a securities fraud wolf dressed up in a breach of contract sheep's clothing. The gravamen of the Amended Complaint ... is that conflicts of interest were created ... , conflicts "which were undisclosed to Plaintiffs and the class members. . .While Morgan Stanley customers believed that they were paying for and receiving informed and objective investment advice, they actually received recommendations based on Morgan Stanley's existing or desired investment banking deals." Plaintiffs describe this conduct as a breach by Morgan Stanley "of the standardized contracts with the Plaintiffs and Class members," and so it

> may have been, but it is also a quintessential example of a fraudulent omission of a material fact under the federal securities laws.

Id. at 693.

In Spencer, the plaintiff alleged that the defendant engaged in self-dealing by investing trust assets in affiliated mutual funds without disclosing that the funds were affiliated with the defendant and by charging undisclosed advisory and management fees against the trust assets. 2006 WL 348043, at * 1. Attempting to avoid SLUSA preemption, the plaintiff argued that her claim was for breach of fiduciary duty and was not predicated on misrepresentations or omissions. In rejecting the argument, the Spencer court noted that the complaint was rife with claims of misrepresentations and dismissed the action based on SLUSA preemption. Id. at *4.

In Beckett, the plaintiff learned that the defendant had assessed fees for a requested stock sale and sued for breach of contract, breach of fiduciary duties, unjust enrichment, and state consumer protection law violations. 2006 WL 3249189, at *1. Notably, the complaint contained "no explicit reference to any fraudulent activity such as a misrepresentation or omission of material fact." Id. at *3. Nonetheless, the court ruled:

> Any reasonable reading of [the] complaint evidences allegations of misrepresentation or omission of material facts in connection of the purchase or sale of securities. The allegation of charging of undisclosed fees and paying Plaintiff share proceeds below prevailing market

> prices is an allegation of a misrepresentation or omission of material fact concerning the terms of the sale of stocks.

Id. at *4. Thus, the court ruled that SLUSA preempted the state law class claims.

In Broadhead, the plaintiff alleged that the defendant breached fiduciary duties by failing to disclose all fees and expenses charged to investors. 2007 WL 951623, at *1. As in this case, the defendant had discretionary authority over the plaintiff's account and had a fiduciary duty to disclose fees earned in connection with the plaintiff's transactions. Id. The plaintiff asserted various state law claims, including breach of fiduciary duty, breach of contract, and unjust enrichment. Id. at *2. Nonetheless, the court disregarded the "labels assigned to the causes of action" and determined that complained-of conduct was the failure to disclose fees associated with bond purchases. Id. at *5. SLUSA preemption therefore applied. Id.

Dommert also involved a defendant who had complete discretionary authority over the plaintiff's funds. 2007 WL 1018234, at *2. The plaintiff alleged that the defendant breached an investment management service agreement and its fiduciary duties by failing to act in her best interest and by failing to disclose material information about fees assessed against her. Id. at *2-*3. Recognizing that courts must look at the allegations as a whole, the court noted that the complaint made "specific references to omissions and failures to disclose" and ruled that the claims were "clearly based upon alleged fraudulent omissions." Id. at *7-*8. It further

explained:

> The core basis of her claims is that the Defendants failed to disclose important information to the Plaintiffs, including material details about fees and financial gain retained by Defendant to the Plaintiffs, luring investors into paying excessive fees. . . . Whether these alleged failures to disclose are couched in the terms of a fiduciary duty or claims of fraud, they are, in their simplest form, allegations that the Defendants "omitted" important information from their disclosures to Plaintiffs under the Agreement. . . .No matter how she legally characterizes her claims, material misrepresentations and omissions serve as the factual predicate for Plaintiff's state law claims.

Id. at *8.

In Rabin, the plaintiffs were beneficiaries of a trust maintained by the defendant. 2007 WL 2295795, at *1. As in this case, the plaintiffs alleged that the defendant unilaterally invested fiduciary account assets into its proprietary mutual fund without regard to whether such investments were in the best interests of the beneficiaries. Id. The plaintiffs further contended that the defendant generated undue profits by charging excessive fees. Id. They maintained that the breach of fiduciary duty and unjust enrichment claims were "merely ancillary to and not predicated upon" material misrepresentations and omissions. Id. at *6. The court rejected that argument, reasoning that

attempts to disguise securities fraud claims as breach of fiduciary duty claims are "not enough to evade preclusion of those claims under SLUSA." Id. (citing Potter v. Janus Inv., 483 F. Supp. 2d 692, 702 (N.D. Ill. 2007). Thus, the court analyzed the substance of the allegations and found that misrepresentations and omissions of material facts relating to the purchase of mutual fund shares were "the heart of the Amended Complaint." Id.

The analyses in all these cases apply in this action. Plaintiffs purposefully distance themselves from any fraud claims and cast their claims as various state law claims. Nonetheless, as Plaintiffs' counsel recognized at oral argument, the essence of the Amended Complaint is that Defendants misrepresented and omitted material facts relating to the transfer of assets to Nations Funds, such as conflicts of interest and expenses related to the transfer. These allegations are incorporated into the state law claims by reference. See Prof'l Mgmt. Assocs., Inc., 335 F.3d at 803; Rowinski, 398 F.3d at 300. Moreover, each state law claim hinges on harm caused by Defendants' misrepresentations and omissions of material facts regarding the purchase of Nations Funds. Thus, the attempt to cast their allegations as state law claims is unavailing.

2. "In Connection with the Purchase or Sale of a Covered Security"

Both parties are well aware of how this Court has interpreted the "in connection with" requirement in light of Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71 (2006). See Siepel, 239 F.R.D. at 568-69. Thus, the Court will add only that several recent cases have paralleled the analysis in

Siepel. See U.S. Mortgage, Inc. v. Saxton, __ F.3d __, 2007 WL 2027370, at *5-*8 (9th Cir. July 13, 2007) (rejecting the argument that SLUSA was inapplicable because the plaintiffs did not purchase any security in response to the misrepresentation and therefore did not allege a fraud in connection with the purchase or sale of a security); Disher v. Citigroup Global Mkts., Inc., 487 F. Supp. 2d 1009, 1018 (S.D. Ill. 2007) (finding that the plaintiffs lacked standing to sue under federal securities law did not take the claims out of the scope of SLUSA preemption); Fisher v. Kanas, 487 F. Supp. 2d 270, 277 (E.D.N.Y. 2007) (noting that Dabit instructs courts to interpret SLUSA broadly to include "any misrepresentation touching upon the purchase or sale of securities"); Rubery v. Radian Group, Inc., No. 07-1068, 2007 WL 1575211, at *2 (E.D. Pa. May 31, 2007) (refusing to permit "manipulative tactics" to avoid SLUSA preemption through artful pleading and holding that an exchange as part of a merger was sufficient to satisfy the "in connection with" requirement); Dommert, 2007 WL 1018234, at *9-*12 (noting that the purpose of the agreement was to manage the plaintiff's assets, which encompassed the purchase and sale of stock and therefore met the "in connection with" requirement); Rabin, 2007 WL 2295795, at *7 (finding the "in connection with" requirement met even though the plaintiffs did not purchase, sell, or hold shares because the plaintiffs alleged that defendant engaged in a scheme to invest proceeds from the beneficiaries' accounts into a proprietary mutual fund).

Plaintiffs allege that Defendants misled fiduciary account beneficiaries about Nations Funds and the fees associated with transferring fiduciary

account assets to the funds. The alleged deception was premised on the purchase of Nations Funds, and Plaintiffs' alleged injury was linked directly to the forced purchase of Nations Funds with fiduciary account assets. Thus, SLUSA preempts the state law class action claims. The Court grants the Motion to Dismiss on all class claims.

C. Kutten's Individual Claims

Kutten argues that her individual state law claims remain despite dismissal of the class action claims. She relies on diversity jurisdiction under 28 U.S.C. § 1332(a). Defendants advance three arguments in favor of dismissing Kutten's individual claims: (1) SLUSA requires dismissal of the individual claims; (2) Kutten is collaterally estopped from arguing that she meets the amount-in-controversy requirement under § 1332(a); and (3) Kutten has failed to present sufficient evidence to meet the amount-in-controversy requirement.

1. SLUSA Preemption

Defendants argue that SLUSA preemption requires dismissal of Kutten's individual claims. SLUSA mandates dismissal of an entire class action when at least one of the class action claims is preempted. See 15 U.S.C. § 78bb(f)(1); see also In re Lord Abbett Mut. Funds Fee Litig., 463 F. Supp. 2d 505, 511-15 (D. N.J. 2006). However, SLUSA preemption applies only to class actions. This case is unusual because it includes both class action claims and individual claims. SLUSA preempts the state law class action claims, but the individual claims survive.

2. Collateral Estoppel

Defendants argue that Kutten is collaterally estopped from asserting that her individual claims meet the amount-in-controversy requirement under § 1332(a). Kutten argues that collateral estoppel does not apply because the issue of whether her damages exceed the amount-in-controversy requirement was not an issue of ultimate fact previously determined by a valid and final judgment.

"The underlying goal of issue preclusion, also known as collateral estoppel, is to promote judicial economy and finality in litigation." Allstate Ins. Co. v. Blount, 491 F.3d 903, 909 (8th Cir. 2007) (citation omitted). To determine whether to apply collateral estoppel, the Court considers the following four factors:

> (1) whether the issue decided in the prior adjudication was identical to the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom estoppel is asserted was a party or was in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit.

Id. (citation omitted). Although dismissal without prejudice does not result in claim preclusion, "an issue actually decided in a non-merits dismissal is given preclusive effect in a subsequent action between the same parties." Pohlmann v. Bil-Jax, Inc., 176 F.3d 1110, 1112 (8th Cir. 1999). Thus, courts have barred parties from re-litigating the issue of

subject matter jurisdiction, even where the previous action was dismissed without prejudice. Id. (citing Healy v. Atchison, Topeka & Santa Fe R.R., 287 S.W.2d 813, 815 (Mo. 1956); see also Oglala Sioux Tribe of Pine Ridge Indian Reservation v. Homestake Mining Co., 722 F.2d 1407, 1411 (8th Cir. 1983) ("Dismissal of a suit for lack of federal subject matter jurisdiction precludes re-litigation of the same issue of subject matter jurisdiction in a second federal suit on the same claim."); Sexton v. Jenkins & Assocs., Inc., 152 S.W.3d 270, 273 (Mo. 2004) (although dismissal of first action was without prejudice, the first action adjudicated the issue of subject matter jurisdiction; thus, the second action was precluded by the first action, pursuant to collateral estoppel).

Nonetheless, the Court finds that collateral estoppel should not apply in the unusual circumstances of this case. Kutten previously asserted individual claims against Defendants in Kutten et al. v. Bank of America, N.A. et al., No. 04-0244 (Kutten I).[4] In May 2006, the Court found that Kutten failed "to submit a scintilla of evidence" required to establish diversity jurisdiction under § 1332(a). Kutten I, 2006 WL 1520588, at *2 (E.D. Mo. May 26, 2006). The Court further noted that none of the documents on which Plaintiffs relied was included in the record. Id. The Court does not

[4] Kutten commenced Kutten I on behalf of herself and her daughters, as well as on behalf of the putative class and a Missouri sub-class. As in this case, she asserted that Defendants had breached various fiduciary and contractual duties with respect to the administration of trust accounts. Thereafter, the complaint was amended to add Plaintiffs Mary Ann Arnold and Elsie Mahler Scharff and to drop Ellen Jane Kutten as a class representative. The amended complaint asserted fifteen claims, including breach of fiduciary duty, breach of contract, unjust enrichment, and violations of various California and Missouri statutes.

condone the inefficiency and ineffectiveness of Plaintiffs' counsel relating to this issue. If Kutten had the proof to meet the amount-in-controversy requirement in Kutten I, she should have presented it then. Nonetheless, the Court dismissed the action without prejudice to allow Plaintiffs to cure the jurisdictional deficiencies in Kutten I and to name additional plaintiffs.[5] Thus, the Court finds that collateral estoppel does not apply here because the Court provided Kutten another opportunity to establish subject matter jurisdiction.[6]

3. Sufficiency of the Evidence

Defendants also argue that Kutten fails to present sufficient evidence to meet the amount-in-controversy requirement. When determining the amount in controversy, "a complaint that alleges the

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[5] The additional named plaintiffs were Michael R. Medler, Jeffrey P. Medler, and John F. Medler, Jr. In May 2007, the Court dismissed all claims by the Medlers based on a joint stipulation.

[6] The Court dismissed the action without prejudice because Plaintiffs claimed they could establish subject matter jurisdiction by asserting federal law claims. The initial Complaint asserted six federal securities law claims, as well as claims ofbreach of fiduciary duty, aiding and abetting, unjust enrichment, and violations of various California and Missouri statutes. In response to a motion to dismiss, the plaintiffs filed the Amended Complaint, which withdrew the federal securities law claims and added other state law claims. Jurisdiction was based on the Class Action Fairness Act of 2005, see 28 U.S.C. § 1332(d), and supplemental jurisdiction under 28 U.S.C. § 1367. (Am. Compl. ¶ 13.) However, the Amended Complaint also alleges "Kutten has sustained damages in excess of $75,000," thereby implicitly invoking diversity jurisdiction under 28 U.S.C. § 1332(a). (Id.)

jurisdictional amount in good faith will suffice to confer jurisdiction, but the complaint will be dismissed if it appears to a legal certainty that the claim is really for less than the jurisdictional amount." Capitol Indem. Corp. v. 1405 Assocs., Inc., 340 F.3d 547, 549 (8th Cir. 2003) (citation omitted). Because Defendants challenge the allegations as to the amount of controversy, Kutten must establish by a preponderance of the evidence that she satisfies the amount-in-controversy requirement. Rasmussen v. State Farm Mut. Auto. Ins. Co., 410 F.3d 1029, 1031 (8th Cir. 2005) (citation omitted).

First, it is noteworthy that Kutten attempts to bear her burden in a terse footnote, merely proclaiming that her damages exceed the amount-in-controversy requirement. (Pls.' Mem. Opp'n Mot. Dismiss at 33 n.14.) Nowhere does Kutten specifically identify the total amount she seeks in damages. Second, much of her declaration and exhibits have no bearing on the amount in controversy. For example, the first sixteen paragraphs and approximately twenty exhibits relate to her dissatisfaction with Defendants' conduct but have no bearing on the amount-in-controversy requirement. (Kutten Decl. ¶¶ 1-16, Exs. A-L, N-0.)

Paragraph 17 of her declaration, as well as exhibits attached, appear to support her damages claim. However, there are several flaws and inconsistencies in this evidence. For example, in Paragraph 17(a), Kutten explains that she incurred $6,600 in attorneys' fees (see id. ¶ 17(a), Ex. P.) but does not explain why she is statutorily entitled to those fees. As the Court explained in Kutten 1, "only statutory attorney fees count toward the jurisdictional minimum calculation." 2006 WL

1520588, at *4 (citing Rasmussen, 410 F.3d at 1031). Likewise, the Court already ruled that Kutten failed to meet the standard for punitive damages, see id. at *2-*3, which Kutten relies on in Paragraph 17(o). (Kutten Decl. ¶ 17(o).)

In Paragraph 17(b), Kutten calculates fees paid to the Bank during certain periods, but the underlying exhibit does not support her calculation. (Id. 17(b), Ex. Q.) Kutten also relies on a morass of account statements but does not pinpoint any specific area of reference. (Id. Ex. EE.) The Court will not sift through the record to locate evidence to support her position. See Rodgers v. City of Des Moines, 435 F.3d 904, 908 (8th Cir.2006) ("Without some guidance, we will not mine a summary judgment record searching for nuggets of factual disputes to gild a party's arguments"); Nw. Nat'l Ins. Co. v. Baltes, 15 F.3d 660, 662-63 (7th Cir.1994) ("District judges are not archaeologists."); United States v. Dunkel, 927 F.2d 955, 956 (7th Cir.1991) ("Judges are not like pigs, hunting for truffles buried in briefs"); Nicholas Acoustics & Specialty Co. v. H & M Constr. Co., Inc., 695 F.2d 839, 846-47 (5th Cir. 1983) ("Judges are not ferrets!").

In Paragraphs 17(d) and 17(e), Kutten claims to have suffered losses in 2003 but again cites to a mass of account statements dated 1999 through 2000—not 2003. (Kutten Decl. ¶17(d)-(e), Ex. EE.) In Paragraphs 17(f) through 17(h), she complains of losses in a Charles Schwab brokerage account, which has no connection to the conduct alleged in the Amended Complaint. (Id. ¶¶ 17(f)-(h), Exs. U-W.) In Paragraphs 17(i) and 17(k), she claims that the Kutten trust accounts lost money due to Defendants' misconduct, but the document supporting the claim

shows that the accounts increased in value. (Id. ¶¶ 17(i), (k), Ex. X.) Similarly, in Paragraph 17(m), she claims that the investment in Nations Funds caused the trust accounts to decline in value. (Id. ¶¶ 17(m).) However, the document on which she relies shows that Nations Funds provided a gain—not a loss. (Id. Ex. ER)

However, some evidence supports a finding that the amount-in-controversy requirement is met. First, Kutten explains that the Kutten trust accounts lost approximately $9,343 from October 17, 2003 to November 26, 2003, the period the Bank refused to sell Nations Funds. (Id. ¶ 17(c), Ex. R.) Defendants present no evidence to refute this statement. Second, Kutten calculates that the Bank charged her and her daughters more than $150,000 in fees, "none of which were earned by the Bank and all of which are recoverable as damages." (Id. ¶ 17(1); Ex. BB.) Defendants contend that account statements show that one of Kutten's daughters paid only $10,000—not $50,000 as claimed. However, Defendants do not challenge the remaining $100,000 in fees assessed. Finally, Kutten calculates that the Kutten trust accounts paid $14,555 in fees relating to the investment in Nations Funds. (Id. ¶ 17(j), Ex. Z.) Defendants do not challenge this calculation either.[7] Based on this evidence, the Court cannot conclude

[7] Defendants also argue that the Court should disregard Kutten's declaration altogether, contending that it contradicts her prior deposition testimony. However, Kutten previously testified that she was unable to determine the damages she suffered and deferred to her expert witness. Through the declaration, Kutten shows that she now has determined her damages. Thus, her declaration is not inherently inconsistent with her prior deposition testimony.

with legal certainty that Kutten fails to meet the amount-incontroversy requirement under § 1332(a).[8] The individual claims survive the Motion to Dismiss.

CONCLUSION

SLUSA preempts all state law class claims asserted in this action. However, Kutten has established diversity jurisdiction over her individual claims. Accordingly, **IT IS HEREBY ORDERED** that:

1. Defendants' Motion to Dismiss the Amended Complaint (Docket No. 41) is **GRANTED in part** and **DENIED in part**; and

2. Counts 1-12 of the Amended Complaint are **DISMISSED with prejudice**.

Dated: August 29, 2007

s/ Paul A. Magnuson
Paul A. Magnuson
United States District Court Judge

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[8] There is no dispute that Kutten meets the diversity-of-citizenship requirement under 28 U.S.C. § 1332(a)(1).

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Supreme Court, U.S.
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No. 08-333

In the Supreme Court of the United States

MARY ANN ARNOLD; ELSIE MAHLER SCHARFF, on behalf of themselves and all others similarly situated,

Petitioners,

v.

BANK OF AMERICA, N.A.; AND BANK OF AMERICA CORP.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Court of Appeals for the Eighth Circuit erred when, in keeping with the plain language of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), this Court's recent and controlling decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006), and a uniform body of federal and state cases, it held that SLUSA preempted Petitioners' state law class action?

LIST OF PARTIES AND RULE 29.6 STATEMENT

All of the parties are listed in the caption. The parent company of Respondent Bank of America, N.A., is N.B. Holdings Corporation, a wholly owned subsidiary of Respondent Bank of America Corporation ("BAC"). BAC is a publicly traded company; it has no parent company; and there is no publicly held corporation that owns ten percent or more of BAC.

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INTRODUCTION

The petition attempts to craft an issue for this Court's review where none exists. The opinion below and in *Siepel v. Bank of America, N.A.*, 526 F.3d 1122 (8th Cir. 2008), ably demonstrate that there is no conflict in the law concerning the preemptive effect of the federal Securities Litigation Uniform Standards Act of 1998 ("SLUSA") upon class actions such as this one.

This Court's decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 80, 85-86 (2006), makes clear that, subject to certain express statutory exceptions not relevant here, SLUSA preempts the use of the class action device in cases where a complaint asserts state law claims and includes allegations of misrepresentations and omissions of material facts or the use of a deceptive device or contrivance that "coincide" with or "touch[]" upon the purchase or sale of a covered security. *Dabit* further makes clear that SLUSA must be enforced as written by Congress—without any judicially-created exceptions or limitations.

Numerous courts have applied *Dabit*'s mandate to a wide variety of state law class action claims implicating the purchase and sale of federal securities. This includes six cases that hold that SLUSA preempts state law class action claims brought in this *precise* context—by trust beneficiaries asserting state law claims for breaches of fiduciary duties based on alleged misstatements and omissions of material facts concerning the investment of trust assets in mutual funds. There are no cases to the contrary. Moreover, no court has ever held, as Petitioners argue, that SLUSA's

preemptive effect is limited to those cases where there are allegations of "market manipulation" or stock price "inflation." Pet. 12-20. Nor has any court construed SLUSA to require that the plaintiff allege that he or she personally made an investment decision to buy, sell, or hold any security in reliance on an alleged misrepresentation. Indeed, such a narrow reading of statutory "in connection with" language was rejected by this Court in *Dabit* and *SEC v. Zandford*, 535 U.S. 813, 813-14 (2002).

Nor is there any reason to think, as Petitioners would have it, that the decision below—or any of the many others whose reasoning it relies on—presents some grave threat to state trust law in general or their state law claims in particular. SLUSA's express federal statutory directive only precludes use of the class action device for those transactions or claims that fall within its ambit. The application of the statutory text to this particular complaint does not impact, in any respect, the substance of state trust law or individual state law claims. *See, e.g., U.S. Mortgage, Inc. v. Saxton*, 494 F.3d 833, 843-45 (9th Cir. 2007) (noting that would-be plaintiffs can avoid SLUSA "completely" by omitting class allegations and bringing claims in "groups of 50 or less").

In reality, therefore, Petitioners are asking this Court to grant review in a case where (1) there are recent controlling decisions by this Court which resolve the questions presented by the Petition and (2) this Court and lower courts uniformly have rejected the arguments that Petitioners now advance.

The Petition should be denied.

COUNTERSTATEMENT OF THE CASE

This case is one of multiple, overlapping class actions filed by Petitioners' attorneys on behalf of a revolving group of named plaintiffs and a putative class of beneficiaries with trust assets invested in Nations Funds, a family of mutual funds managed by an affiliate of Bank of America, N.A. and Bank of America Corporation (collectively, the "Bank"). Pet. App. 1.

In each of these actions, the named plaintiffs alleged that they are beneficiaries of trust accounts for which the Bank serves as trustee. They further alleged that the Bank has discretion to decide how to invest trust assets and that Bank frequently exercised that discretion to invest trust assets in nationally traded securities, including mutual funds. According to the complaints, the Bank allegedly breached its contractual and fiduciary duty as trustee by investing trust assets in shares of the Nations Funds and concealing or misrepresenting material facts concerning these Nations Funds investments. *Id.*

The procedural history of these various actions is well-chronicled in *Siepel v. Bank of America, N.A.*, 239 F.R.D. 558, 561-63 (E.D. Mo. 2006), *aff'd*, 526 F.3d 1122 (8th Cir. 2008). The focus here is limited to the procedural history of this case.

Petitioners' original complaint asserted class-wide claims based on various federal securities laws, including Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b); SEC Rule 10b-5, 17 C.F.R. § 240.10b-

5; and Sections 11 and 12 of the Securities Act, 15 U.S.C. §§ 77k and 77l. R. 1.[1] It also asserted class-wide claims based on state law for breach of contract, breach of fiduciary duty, unjust enrichment, and violations of California and Missouri statutes. *Id.*

The Bank moved to dismiss the original complaint. R. 18. In response, Petitioners filed an amended complaint that abandoned their federal securities claims but continued to assert the same state law claims on behalf of themselves and the same putative nationwide class. R. 23.

After Petitioners abandoned their federal securities claims, the Bank moved to dismiss Petitioners' amended complaint on various grounds, including SLUSA preemption. R.41, 42. The district court heard the Bank's motion to dismiss on August 1, 2007, R. 56, and, on August 29, 2007, entered a memorandum and order dismissing the Petitioners' state law class action claims. Pet. App. 5-29 (district court opinion). The district court thoroughly analyzed Petitioners' charging allegations and the relevant case law, including its prior decision in *Siepel*, 239 F.R.D. 567-72. *Id.* Because the "crux" of Petitioners' amended complaint concerned alleged misstatements and omissions of fact coinciding with the investment of trust assets in Nations Funds, the court held that SLUSA applied and preempted Petitioners' state law class action claims. *Id.*

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1 "R. __" refers to entries on the district court docket.

On October 1, 2007, the court issued an order pursuant to Fed. R. Civ. P. 54(b), directing the entry of a final judgment on the state law class action claims asserted by Petitioners on behalf of themselves and a putative class of beneficiaries with trust assets invested in the Nations Funds. R. 64. Judgment was entered that day. R. 65. Petitioners timely appealed the dismissal of their state law class action claims.

On appeal, Petitioners argued that the district court (1) misapprehended the scope of SLUSA by refusing to follow cases that concern the elements of an implied private action under section 10(b) of the the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) and Rule 10b-5 (17 C.F.R. § 240.10b-5); and (2) failed to properly distinguish this case from *Siepel*, 239 F.R.D. at 567-72, and other cases addressing SLUSA's preemptive reach. The Court of Appeals, in turn, examined Petitioners' amended complaint and the relevant case law, including its decision affirming the dismissal of *Siepel*, 526 F.3d at 1124-25. The Court of Appeals concluded that (1) Petitioners' pleading asserted a state law class action that described misstatements and omissions of material facts and the use of a deceptive and manipulative device or contrivance, thereby triggering SLUSA and (2) Petitioners failed to distinguish this action from *Siepel*. Pet. App. 1-4.

REASONS FOR DENYING THE WRIT

I. The Decision Below Applying SLUSA To Petitioners' State Law Class Action Complaint Is Based On Recent Controlling Decisions Of This Court And A Uniform Body Of Federal And State Cases Rejecting Petitioners' Arguments.

A. There Is No Controversy Or Conflict Concerning The Factors Necessary For SLUSA Preemption.

More than a decade ago, Congress became concerned that the class action device was being misused in securities cases. That concern prompted Congress to enact the Private Securities Litigation Reform Act of 1995 (the "1995 Reform Act"), 15 U.S.C. §§ 77z-1 and 78u-4. *See Dabit*, 547 U.S. at 81-82. The 1995 Reform Act imposes, among other things, heightened pleading requirements and discovery stays in actions brought pursuant to section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) and Rule 10b-5 (17 C.F.R. § 240.10b-5). *Id.* at 82.

The 1995 Reform Act, however, produced certain "unintended consequence[s]" for securities class actions nationwide. *Dabit*, 547 U.S. at 82. "Rather than face the obstacles set in their path by the Reform Act, plaintiffs and their representatives began bringing class actions under state law, often in state court." *Id.* To forestall this end run around federal securities laws, Congress enacted SLUSA. *Id.* SLUSA compels the dismissal of class actions asserting state law theories of liability that arise in

connection with the purchase or sale of covered securities. *Id.*

In keeping with express federal policy, therefore, SLUSA preemption does not turn on the label attached to, or the specific elements of, the causes of action alleged in a particular complaint. Nor does SLUSA preemption depend on whether a particular plaintiff could bring a private action under federal securities laws. SLUSA preemption instead applies whenever the statute's four-part test is satisfied. That is, with very limited, express exceptions, SLUSA preemption applies any time the lawsuit: (1) is a "covered class action"; (2) asserts a claim based on state law; (3) involves a "covered security"; and (4) alleges that the defendant misrepresented or omitted a material fact or employed any manipulative or deceptive device "in connection with the purchase or sale of a covered security." *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1092 (11th Cir. 2002) (applying SLUSA to amended complaint asserting class-wide claims for breach of contract, breach of fiduciary duty, misrepresentation, suppression, unjust enrichment, and negligence arising out of sale of mutual fund shares and failure to disclose excessive fees); *Saxton*, 494 F.3d at 843-45 (claims of lenders with security interest in stock); *Sofonia v. Principal Life Insurance Co.*, 465 F.3d 873, 879-80 (8th Cir. 2006) (claims concerning approval of an insurance company "demutualization" plan).

B. There Is No Controversy Or Conflict Concerning The Meaning Of SLUSA's "In Connection With" Language Or The Scope Of SLUSA Preemption.

The opinions below make clear that Petitioners' amended complaint satisfies each one of SLUSA's requirements. Pet. App. 1-4, 5-10, 11-22. First, Petitioners' amended complaint indisputably asserts a "covered class action"—*i.e.*, a class action that seeks damages on "behalf of more than 50 persons or prospective class members," 15 U.S.C. § 78bb(f)(5)(B) (definition of a "covered class action"). Pet. App. 1-2. Second, Petitioners' amended complaint likewise asserts class action claims based on state law, 15 U.S.C. § 78bb(f)(1). Pet. App. 1-2, 5-10. Third, Petitioners' amended complaint involves the purchase and sale of a "covered security"—*i.e.*, shares of investment companies registered with the Securities and Exchange Commission under the Investment Company Act of 1940 (and commonly referred to as "mutual funds"). 15 U.S.C. § 78bb(f)(5)(E).

SLUSA's fourth requirement—allegations of misrepresentations, omissions, deception, or manipulation "in connection with" the purchase or sale of a covered security—is met here as well. To begin with, Petitioners' amended complaint plainly accuses the Bank of false statements, misleading statements, and failures to disclose material information concerning the use of some of Petitioners' trust fund assets to purchase shares of Nations Funds. Pet. App. 2-4 (noting that Petitioners' express allegations accused the Bank of

false statements, misleading statements, and failures to disclose; that Petitioners' counsel conceded at oral argument that Petitioners' class action directly challenges the adequacy of disclosures made by the Bank to trust beneficiaries; and that the gravamen or "substance" of the transactions and conduct alleged was identical to the deceptive and manipulative scheme alleged in *Siepel*, 239 F.R.D. at 567-72, *aff'd*, 526 F.3d at 1127-28).

Petitioners nevertheless contend that the Court of Appeals for the Eighth Circuit and the district court erred grievously when each court concluded that the amended complaint alleged misrepresentations, omissions, deception and manipulation by the Bank "in connection with" the purchase and sale of Nations Funds shares. Pet. 9-20. Specifically, Petitioners argue that SLUSA's "in connection with" language must be construed narrowly to cover *only* those deceptive and manipulative statements, acts, and omissions that inflate stock prices, manipulate securities markets, or otherwise induce a private plaintiff to make an investment decision to buy, sell, or hold a covered security. *Id.* Petitioners argue that the Court of Appeals' construction of the statutory phrase "in connection with" is based on an improper and overbroad reading of this Court's decision in *Dabit* and conflicts with decisions of the Courts of Appeals for the Third, Seventh, Ninth, and Tenth Circuits. *Id.*

A fair reading of the relevant cases, however, demonstrates that there is no controversy or conflict concerning the construction of the statutory phrase "in connection with"; nor is there any conflict or

controversy concerning the scope of SLUSA preemption. Although Petitioners firmly disavow it, their allegations concerning the Bank's purported misrepresentations, omissions, and alleged deceptive scheme plainly satisfy SLUSA's "in connection with" requirement. Unanimous and controlling precedent so provides.

1. This Court's Construction In *Dabit* Of The Statutory Phrase "In Connection With" Controls The Outcome Of This Case And Leaves Nothing For This Court To Review.

In *Dabit*, this Court construed the "in connection with" language used in SLUSA and held that this statutory phrase should receive the same "broad construction" historically given to the "in connection with" language of Section 10(b) of the Exchange Act (15 U.S.C. § 78j(b)) and Rule 10b-5 (17 C.F.R. § 240.10b-5). *Dabit*, 547 U.S. at 80, 85-86. According to *Dabit*, the broad, historic construction of this phrase extends "flexibly" to cover *any* deceptive or manipulative practices "'touching'" the purchase or sale of a covered security. *Id.* (quoting *Superintendent of Insurance of N.Y. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12-13 (1971); *United States v. O'Hagan*, 521 U.S. 642, 651, 658 (1997); *Zandford*, 535 U.S. at 819-20).

Moreover, in re-affirming this historic construction of the phrase "in connection with," *Dabit* also considered and rejected an alternate narrow reading of "in connection with" that was substantially similar to the reading advanced by

Petitioners here—*i.e.*, a reading that would limit the scope of SLUSA based on the elements necessary to bring an implied private right of action under Section 10(b) of the Exchange Act and Rule 10b-5. *Id.* (refusing to read SLUSA's "in connection with" language narrowly based on the prudential limitations placed on implied private rights under *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975)). Like Petitioners here, the *Dabit* respondents contended that it would be illogical and incongruous to apply SLUSA in cases where the plaintiffs' class action claims did not satisfy the elements necessary to support an implied private right of action under Section 10(b) of the Exchange Act and Rule 10b-5. *Dabit*, 547 U.S. at 80, 85-86. (citing *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25 (2d Cir. 2005)).

This Court disagreed with the *Dabit* respondents. The Court reversed the Second Circuit's opinion adopting the respondents' narrow construction of SLUSA and opted for the Seventh Circuit's much broader construction of the statute in *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (7th Cir. 2005). 547 U.S. at 83-88. By embracing and affirming the Seventh Circuit's reasoning in *Kircher*, this Court made it clear that SLUSA's preemptive effect cannot be narrowed by construing the statute's "in connection with" language in light of the judicially-created elements necessary to support an implied private right of action under Section 10(b) of the Exchange Act and Rule 10b-5. *Dabit*, 547 U.S. at 84 (refusing to apply limitations on private party standing adopted in *Blue Chip Stamps* to SLUSA's "in connection with" requirement because *Blue Chip Stamps*' private party standing rules stemmed from

"prudential" judicial "policy" concerns and not a legal construction of words "in connection with"). Rather, consistent with *Dabit*, SLUSA's preemptive reach extends to state law class action claims, "regardless of whether federal securities laws furnish a remedy to a plaintiff." *Potter v. Janus Investment Fund*, 483 F. Supp. 2d at 692, 702 (S.D. Ill.), *appeal dismissed*, 495 F.3d 366 (7th Cir. 2007); *Disher v. Citigroup Global Markets, Inc.*, 487 F. Supp. 2d 1009, 1018 (S.D. Ill. 2007) (the fact that the plaintiffs lack standing to sue "does not take such claims out of the scope of SLUSA").

According to *Dabit*, nothing in the language of the statute suggested that Congress intended such a narrow reading of "in connection with" and, as *Dabit* further observed: "Congress can hardly have been unaware of the broad construction adopted by both this Court and the SEC when it imported the key phrase—'in connection with the purchase or sale'—into SLUSA's core provision." *Dabit*, 547 at 85.

Thus, under *Dabit*, the statutory phrase "in connection with" does not require, as a prerequisite to SLUSA's application, allegations that a plaintiff made any investment decision to buy, sell, or hold any security in "reliance" on an alleged misrepresentation, omission, or act of deception or manipulation; nor does it require allegations of "fraud on the market," "market manipulation," or "stock inflation." *Compare Dabit*, 547 U.S. at 80, 85-86 *with* Pet. 6-20. To the contrary, in *Dabit*, the Court held SLUSA's "in connection with" requirement can be satisfied even where the plaintiff played *no* role in the purchase or sale of the security and thus could not bring a private cause of action under federal securities laws. *See Dabit*, 547 U.S. at

83-88; *Zandford*, 535 U.S. at 819-25. As the Court explained it:

> Under our precedents, it is enough that the fraud alleged "*coincide*" with a securities transaction—whether by the plaintiff *or by someone else*. . . . The requisite showing, in other words, is "deception 'in connection with the purchase or sale of any security,' not deception of an identifiable purchaser or seller."

547 U.S. at 85 (citations omitted) (emphasis added). *See also O'Hagan*, 521 U.S. at 651, 658 (same); *Zandford*, 535 U.S. at 819-20 (same).

Zandford, 535 U.S. 813, one of the precedents cited with approval in *Dabit*, also illustrates why SLUSA's "in connection with" requirement does not turn on the plaintiff's status or identity; whether misrepresentations or omissions resulted in market manipulation, stock price inflation, or the making of an investment decision to purchase, sell, or hold a covered security; or the plaintiff's ability to bring an action under federal securities laws. In *Zandford*, the SEC brought a civil action based on Section 10(b) and Rule 10b-5 against a broker whose clients had given him discretion to manage their account and a general power of attorney to make stock transactions on their behalf. Over time, the broker sold all the clients' stockholdings but diverted the sales proceeds to his own accounts. The Fourth Circuit reversed a judgment against the broker, opining that the sales of the securities had been "merely incidental" to the fraud and that the scheme had not involved the "'manipulation of a particular security.'" *Zandford*,

535 U.S. at 817 (summarizing the Fourth Circuit's reasoning).

This Court rejected the Fourth Circuit's analysis, holding that the broker's scheme occurred "in connection with" the sale of the securities. According to *Zandford*, the sales of securities and the broker's misrepresentations and omissions could not be viewed as "independent events." *Id.* at 820. The broker's misrepresentations and omissions to his clients "coincided with the sales themselves," and each transaction was "deceptive because it was neither authorized by, nor disclosed to" the broker's clients. *Id.* at 820-21.

In sum, the recent and controlling precedents of this Court establish that SLUSA's "in connection with language must be construed broadly and flexibly to encompass any deceptive or manipulative practice that coincides with or touches on the purchase or sale of a covered security and that the statutory phrase may not be narrowed by reference to judicially created elements of an implied private right of action under Section 10(b) and Rule 10b-5 of the Exchange Act. Given this, it is well settled by this Court that misrepresentations, omissions, and deceptive or manipulative conduct can occur "in connection with" the purchase or sale of a covered security even when: (1) the plaintiff did not purchase or sell the security at issue; (2) the plaintiff could not bring an implied private right of action under Section 10(b) or Rule 10b-5; and (3) the alleged purchase or sale is made by another, such as a broker or investment adviser, without the alleged victim making any investment decision in reliance on the market or any specific misstatement, omission, or deceptive or manipulative act.

2. Following *Dabit*, Federal And State Courts Uniformly Have Held That SLUSA Preempts Class Actions Brought In This Precise Context.

In this case and five others, federal and state courts have held that SLUSA preempts state law class action claims brought in this *precise* context—by trust beneficiaries complaining about trust investments in proprietary mutual funds—notwithstanding the respective plaintiffs' contentions, identical to those made here, that SLUSA could not be applied because they had no direct connection to the transaction involving the mutual fund.[2]

In *Spencer*, for example, the court carefully examined *Dabit*, *Zandford*, and several additional cases construing SLUSA and concluded that SLUSA's "in connection with" requirement was satisfied by allegations that a trustee-bank had violated state fiduciary duties when it made alleged misstatements and omissions to its clients concerning the investment of trust assets in shares of various affiliated mutual funds. 2006 WL

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2 *Spencer v. Wachovia Bank, N.A.*, No. 05-81016, 2006 WL 3408043 (S.D. Fla. May 10, 2006); *Siepel v. Bank of America, N.A.*, 239 F.R.D. 558 (E.D. Mo. 2006), *aff'd*, 526 F.3d 1122 (8th Cir. 2008); *Rabin v. JPMorgan Chase Bank, N.A.*, No. 06 C 5452, 2007 WL 2295795 (N.D. Ill. Aug. 3, 2007); *Segal v. Fifth Third Bank, N.A.*, No. 1:07-cv-348, 2008 WL 819290 (S.D. Ohio Mar. 25, 2008), *appeal pending*; and *Wells Fargo Bank, N.A. v. Superior Court of San Francisco County*, 159 Cal. App. 4th 381 (Cal. App. 1st Dist. 2008).

3408043, at *3. In particular, *Spencer* found the requisite connection to a securities transaction sufficient for SLUSA preemption, even though the plaintiff-beneficiaries did not themselves purchase the securities or control the actual investment decision. *Id.* at *7.

Siepel reached the same conclusion based on allegations that mirror those made in this case. 239 F.R.D. at 567-70, *aff'd*, 526 F.3d at 1126-27. As the court put it: "Because both *Dabit* and [other SLUSA cases] focus on the conduct of the defendants and not the identity of the plaintiffs, the Court holds that SLUSA may preempt the state law claims, despite the fact that Plaintiffs are beneficiaries, and not purchasers, sellers, or holders, of the financial accounts at issue." *Id.* at 569.

Rabin, 2007 WL 2295795, at **5-7 & nn. 4 & 5, and *Segal*, 2008 WL 81920, at **3-7, also considered mutual fund transactions virtually identical to the ones involved here and expressly rejected arguments for avoiding SLUSA preemption that are indistinguishable from those made here. Relying on *O'Brien v. Continental Illinois National Bank and Trust Co. of Chicago*, 593 F.2d 54 (7th Cir. 1979), and many of the other cases cited by Plaintiffs in this case, the *Rabin* and *Segal* plaintiffs asserted that SLUSA's "in connection with" requirement was not met "because they lacked investment authority and were beneficiaries rather than purchasers or sellers." *E.g.*, *Rabin*, 2007 WL 2295795, at *7. In each case, the court held that reliance on the plaintiffs' pre-*Zandford* and pre-*Dabit* cases was "misplaced," noting that *Zandford* "belies Plaintiffs' contention that . . . the plaintiff must have possessed

investment authority" in order to satisfy SLUSA's "in connection with" requirement. *Id.*

Most recently, in *Wells Fargo Bank*, the California Court of Appeal likewise examined class action allegations regarding the same type of trust asset investments in mutual funds and concluded that SLUSA preempts state law class action claims similar to those made in this case. In a thorough opinion tracking *Dabit*, *Zandford*, and many of the cases cited by the Petition, the California court squarely rejected each of Plaintiffs' arguments. *Id.*

3. Cases Applying SLUSA In Other Contexts Confirm That, In The Wake Of *Dabit*, There Is No Genuine Conflict Or Controversy With Respect To Construction Of SLUSA's "In Connection With" Language.

The cases cited above involving class actions under state trust law are only part of a uniform body of precedents that, consistent with *Dabit*, have construed SLUSA's "in connection with" requirement broadly and applied SLUSA to class action claims asserting breaches of fiduciary duties, breaches of contract, unjust enrichment, and state statutory violations based on alleged failures to disclose. *See, e.g.*, *Saxton*, 494 F.3d at 843-45 (applying SLUSA to the putative class action claims of lenders, notwithstanding arguments that the lenders did not make any investment decision to purchase, sell, or hold the securities in question); *Sofonia*, 465 F.3d at 879-80 (applying SLUSA to claims arising out of an insurance company "demutualization" plan); *Behlen*, 311 F.3d at 1094 (applying SLUSA to claims that

defendants breached fiduciary duties by selling "Class B" mutual fund shares and failing to disclose excessive fees); *Beckett v. Mellon Investor Services, LLC*, No. C06-5245 FDB, 2006 WL 3249189, at **4-5 (W.D. Wash. Nov. 8, 2006) (same); *Broadhead Ltd. Partnership v. Goldman Sachs Co.*, No. Civ. A. 206CV009TJW, 2007 WL 951623, at **3-5 (E.D. Tex. Mar. 26, 2007) (same where defendants allegedly failed to disclose fees charged in connection with bond transactions for discretionary accounts under defendants control). The decision below fits comfortably within this unbroken line of cases.

In fact, there are no cases cited in the Petition (or otherwise) that demonstrate a genuine conflict or controversy concerning the construction of SLUSA's "in connection with" language and the scope of SLUSA preemption.

The cases cited in the Petition that find SLUSA applicable to state law class action complaints all recognize that, consistent with *Dabit*, a state law class action complaint falls within SLUSA's ambit whenever SLUSA's four elements are satisfied. And none of them holds, or even suggests, that SLUSA applies only to those class action claims that are based on allegations of fraud on the market, price inflation, or manipulation of federal securities markets. *Compare* Pet. 14-16 *with Saxton*, 440 F.3d at 836-39, *and Anderson v. Merill Lynch, Pierce, Fenner & Smith, Inc.*, 521 F.3d 1278 (10th Cir. 2008).

The cases cited in the Petition that find SLUSA inapplicable arise from factual allegations that are easily distinguished from those present here. *See, e.g., Gavin v. AT&T Corp.*, 464 F.3d 634 (7th Cir.

2006) (consumer fraud action arising out of omissions allegedly made by defendant hired to perform certain "post-merger clean-up" services where the alleged omissions had "nothing" to do with any effort, plan, or scheme to purchase or sell securities or any failure to disclose "material" facts concerning securities transactions), *cert. denied*, 127 S.Ct. 1492 (Mar. 5, 2007); *LaSala v. Lloyds TSB Bank, PLC*, 514 F.Supp.2d 447 (S.D.N.Y. 2007) (allegations of "straight forward theft" and money laundering with no connection to a securities transaction); *Beary v. ING Life Ins. & Annuity Co.*, 520 F. Supp. 2d 356 (D. Conn. 2007) (complaint devoid of any allegations concerning misrepresentations or omissions); *Hughes v. LaSalle Bank, N.A.*, No. 02-CV-6384 (S.D.N.Y. Feb. 5, 2008) (same); *Burns v. Prudential Sec., Inc.*, 218 F. Supp. 2d 911 (N.D. Ohio 2002) (state law class action alleging that rogue stock broker and his employer committed wrongful acts that were independent and distinct from one another and not part of any scheme or plan to purchase or sell securities).

The most recent decision cited in the Petition finding SLUSA inapplicable to state law claims is even wider of the mark. *See LaSala v. Bordier et CIE*, 519 F.3d 121 (3d Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3088 (U.S. Aug. 7, 2008) (No. 08-168). In *Bordier*, the Third Circuit was called upon to decide whether SLUSA applied to: (1) the state law claims of a bankrupt corporation being asserted by a trust created pursuant to a Chapter 13 reorganization plan; and (2) separate claims belonging to the bankrupt corporation's shareholders, arising under foreign anti-money laundering laws. In a decision based primarily on

SLUSA's express terms, the Third Circuit held that SLUSA did not preempt either set of claims.

The Third Circuit's conclusion that SLUSA was inapplicable to the state law claims of a bankrupt corporation was based squarely on SLUSA's plain language, which covers only those state law class actions that assert claims and damages directly "on behalf of more than 50 persons or prospective class members" and which further includes specific statutory exceptions expressly allowing courts to consider state law-based derivative actions as well as state law-based claims asserted by a bankruptcy trustee on behalf of a bankruptcy estate. *Id.* (quoting 15 U.S.C. §§ 78bb(f)(1), 78bb(f)(5)(B)(i), 78bb(f)(5)(C), and 78bb(f)(5)(D)). In a similar fashion, the Third Circuit's conclusion that SLUSA was inapplicable to claims arising under foreign anti-money laundering claims also flowed directly from SLUSA's plain language covering only those class actions "based upon the statutory or common law of any [s]tate or subdivision thereof." *Id.* (quoting 15 U.S.C. § 78bb(f)(1)).

Bordier, like the other cited cases, accordingly does not demonstrate any genuine conflict concerning the construction of SLUSA's "in connection with" language or the scope of SLUSA preemption. And it offers no basis for avoiding SLUSA preemption in this case. The *Bordier* Court did not have any occasion to construe SLUSA's statutory "in connection with" language; nor did it have any occasion to address *Dabit* or the majority of the other controlling legal precedents relied upon by the court below.

Bordier supports the decision of the court below by re-affirming the well-settled legal principle set forth in *Rowinski v. Salomon Smith Barney, Inc.*, 398 F.3d 294, 299-300 (3d Cir. 2005), and other cases. Under those authorities, SLUSA extends to any class action claim that explicitly or implicitly includes predicate factual allegations concerning "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security," even if the misrepresentation or omission is not a legal element of the claim. *Id.* Accordingly, where, as here, a plaintiff alleges a misrepresentation or omission of a material fact "in connection with" a securities transaction, the plaintiff cannot avoid SLUSA by arguing that misrepresentations and omissions are not an element of the legal claim. *Id.*

Indeed, the federal and state courts that have analyzed class action claims and allegations brought by trust beneficiaries in this context repeatedly have found Petitioners' arguments concerning *Gavin*, *LaSala*, *Saxton*, and the other cases cited in the Petition unavailing. *See, e.g., Wells Fargo Bank*, 159 Cal. App. 4th at 390-92.

Petitioners' amended complaint expressly alleges personal claims based on state law on behalf of a class of "thousands" of trust beneficiaries and further alleges that Petitioners were personally harmed as a direct result of misrepresentations and omissions in furtherance of an unlawful scheme to use trust assets to purchase mutual funds. *See* pp. 3-5, above (reviewing Petitioners' factual allegations). There is no basis to carve these kinds of allegations out of SLUSA. Rather, as every court that has

considered the matter has concluded, these kinds of allegations fit squarely within SLUSA.

II. The Decision Below Is Consistent With SLUSA's Text As Well As Federal Policy And Does Not Eliminate Any Historically Entrenched State Law Remedy.

Petitioners find themselves yet again at odds with SLUSA's plain language and recent controlling precedent from this Court and others when they argue that the decision below eliminates a historically entrenched state law remedy, interferes with substantive provisions of state trust law, and contravenes principles of federalism. Pet. 20-24.

To begin with, Petitioners' argument disregards SLUSA's plain language, as well as the intent of Congress in enacting the statute. SLUSA broadly extends to class actions brought by "any private party" who "alleg[es]" either a "misrepresentation or omission of a material fact" or the use of a "deceptive" contrivance or scheme "in connection with" the purchase or sale of a covered security. 15 U.S.C. § 78bb(f) (emphasis added). The breadth of the statutory language lays to rest Petitioners' claim that the opinion below somehow "eliminated" a historically entrenched state law remedy when it dismissed Petitioners' class action.

In addition, while SLUSA contains a number of specific exceptions, there are none for state trust law claims, or for actions brought against a trustee for wrongful acquisition of mutual funds, or for a trustee's alleged breach of fiduciary duties in the purchase of mutual funds. Moreover, as this Court

explained in *Dabit*, Congress's inclusion of specific exceptions means that no further exceptions should be implied. *Dabit*, 547 U.S. at 87-88. Thus, the fact that Plaintiffs have alleged trust law claims does not provide grounds for a free pass to escape SLUSA. This is the very point of SLUSA—to preclude the use of state law claims to avoid application of the PSLRA. *See Horattas v. Citigroup Financial Markets Inc.*, No. 1:07-CV-122, 2007 WL 2702704, at **8-9 (W.D. Mich. Sept. 12, 2007) (the presence of allegations against trustee of imprudent investment and breach of duty as prudent investor cannot help a plaintiff "escape the broad preemptive bar of SLUSA").

The federalism concerns Plaintiffs raise concerning SLUSA's broad construction also were considered and rejected in *Dabit*, 547 U.S. at 87-88, where this Court held that concerns about federal law displacing one category of state law class actions could not be relied on to narrow SLUSA's preemptive reach. In this regard, *Dabit* made the telling observation that "SLUSA does not actually pre-empt any state cause of action. It simply denies plaintiffs the right to use the class action device to vindicate certain claims [on behalf of a group of 50 plaintiffs or more]." 547 U.S. at 87. Furthermore, *Dabit* noted that federalism concerns are weak here because "federal law, not state law, has long been the principal vehicle for asserting class-action securities fraud claims." *Id.* at 88 (citing legislative history). While state law breach of fiduciary claims concerning securities transactions theoretically were available before SLUSA, there is nothing to suggest that nationwide class action claims involving trust accounts and the purchase of mutual fund shares

were commonplace. As the *Dabit* Court aptly put it, "[t]his is hardly a situation, then, in which a federal statute has eliminated an historically entrenched state-law remedy." *Id.*

Finally, given its narrow preemptive effect, enforcement of SLUSA preemption does not, as Petitioners suggest, leave any would-be plaintiff without a remedy. Those plaintiffs who have a bona fide federal securities claim are free to bring those claims consistent with the requirements of controlling law. Alternately, SLUSA preempts only those state law claims that are related to securities transactions and that are brought as class actions. To be a "covered class action" under SLUSA, an action must either seek damages by a named plaintiff on behalf of a class, or be asserted by more than fifty people. *See* 15 U.S.C. § 78bb(f)(5). SLUSA thus does not preempt an individual's state law remedies for alleged violations of disclosure obligations with respect to investments. It is only large class action lawsuits that Congress sought to rein in by requiring plaintiffs to assert them under federal law using federal pleading standards. *Saxton*, 494 F.3d at 843-45 (noting that SLUSA does not preempt any substantive state law or deprive any individual of a remedy; rather, SLUSA simply restricts the use of the class action "procedural device").

CONCLUSION

The decision below does nothing more than provide a well-reasoned and thoughtful addition to a uniform body of case law following this Court's recent controlling decision in *Dabit*. Accordingly, the Petition is without merit and should be denied.

Respectfully submitted,

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